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VOLUME 1

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 40

GILBERTVILLE TRUCKING CO., INC., ET AL.,
APPELLANTS,

vs.

UNITED STATES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FILED NOVEMBER 10, 1961

PROBABLE JURISDICTION NOTED FEBRUARY 19, 1962

SUPREME COURT OF THE UNITED STATES

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1191 680

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1197 686

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1199 688

[fol. A]

DOCKET ENTRIES

Civil Action

No. 60-562-S

3 Judge Court

GILBERTVILLE TRUCKING CO., INC., L. NELSON & SONS
TRANSPORTATION COMPANY, CHARLES G. CHILBERG, CLIF-
FORD, J. O. NELSON, GEETA C. CARLSON, and KENNETH
A. H. NELSON,

v.

THE UNITED STATES OF AMERICA, Defendant,

and

INTERSTATE COMMERCE COMMISSION, Intervening Defendant.

28 USC 1336, 1398, 2284, 2321-25

Basis of action: Enjoin and set aside 3 orders
Jun 9, 59; Feb 15, 60; Jul 5, 60.

For Plaintiff:

Mary E. Kelley, 10 Tremont St., Boston 8, Laf 3-6353;

Henry E. Foley, Loyd M. Starrett, Foley, Hoag & Eliot,
10 Post Office Sq., Boston, HU 2-1390;

John J. Graham, 122 Bowdoin St., Boston, Rich 2-1708.

For Defendants:

Robert W. Ginnane, Gen. Counsel;

John H. D. Wigger, Atty., Dept. of Justice, Washington
25, D.C.;

James Y. Piper, Asst. Gen. Counsel, Int. Com. Com.,
Washington 25, D.C.;

James W. Noonan, Asst. U.S. Atty.,

for U.S. of America.

[fol. B]

DATE

FILINGS—PROCEEDINGS

1960

Aug. 8 Complaint (verified) filed

Appendices attached A-H inc. (being Commission's orders, report, etc)

Motion for temporary restraining order and interlocutory judgment, with affidavit of Mary E Kelley attached, filed.

8 Summons issued.

16 Designation of three-judge District Court by Hon. Peter Woodbury under 28 USC 2284, filed, designating Peter Woodbury, Chief Judge, U S Court of Appeals for First Circuit, and Charles E. Wyzanski, Jr., U S District Judge, to sit with George C Sweeney, Chief Judge, USDC.

16 Copy of complaint and motion furnished to all 3 judges.

12 Summons ret'd. by Marshal, served Aug. 12, 1960, filed

Oct. 5 Motion of the Interstate Commerce Commission for leave to intervene as a party deft and notice of motion filed Copy furnished to each of the three Judges

13 WOODBURY, Ch. C.J., GEORGE C. SWEENEY, Ch. Dist. J. and CHARLES E. WYZANSKI, D.J. Order granting leave to Interstate Commerce Commission to intervene as a party deft. Order filed

13 Joint answer of the United States of America and Interstate Commerce Commission, Intervening Deft. filed Notice sent to James Y. Piper, Esq., Asst. Gen. Counsel, Interstate Commerce Com., Washington 25, D.C.

DATE
1961

FILEINGS—PROCEEDINGS

Feb. 16 Appearance of James W. Noonan, Asst. U.S. Atty. for *United States of America*, Deft., filed

27 SWEENEY, Ch.J. The following schedule has been set in connection with case:

(1) Plaintiffs' briefs to be filed by March 20, 1961

(2) Defendants' answering briefs to be filed by April 3, 1961

(3) Plaintiffs' reply briefs to be filed by April 13, 1961

(4) Hearing to be held Monday, May 1, 1961 at 11 A.M. Letter sent to all counsel of record by Judge Sweeney's office Feb. 27, 1961. See letter in file

Apr. 3 Appearance of Loyd M. Starrett for plaintiff filed

3 Brief for plaintiffs filed

3 Certificate of service filed

20 Letter correcting typographical errors in plaintiff's brief filed

21 Brief for plaintiffs (with typographical errors corrected per letter dated April 20, 1961) filed

24 Brief for defendants filed

May 4 Reply brief for plaintiffs filed

4 Certificate of service filed

10 SWEENEY, Ch.J. Hearing: taken under advisement.

July 7 Wyzanski, J. Opinion entered. "... *Complaint dismissed with prejudice and costs.* ..."

D

[fol. C]

DATE

1961

FILINGS--PROCEEDINGS

July 18, WOODBURY, Ch. C.J., SWEENEY, Ch., D.J. and WYZANSKI, D.J. "After hearing and in accordance with the opinion of the Court, it is ORDERED action dismissed with prejudice and with costs." Judgment entered.

Copy to Henry E. Foley, Esq., & Loyd M. Starrett, Esq. Foley, Hoag & Eliot, 10 Post Office Square, Boston; Asst. U. S. Attorney Noonan; Robert W. Ginnane, Esq. General Counsel, and James Y Piper, Asst. General Counsel, I.C.C., Washington 25, D. C.; John H. Wigger, Esq., Department of Justice, Washington 25, D. C.; Mary E. Kelley, Esq., 10 Tremont St., Boston 8 and John J. Graham, Esq., 122 Bowdoin St., Boston.

Sept. 11 Notice of Appeal to the Supreme Court of the U. S., filed by plaintiffs.

Oct. 4 SWEENEY, Ch.J. Motion for transmittal of original papers to Supreme Court, assented to, allowed.

4 Sterographic record of Hearing May 10, 1961 (Pp. 1-64), filed.

[fol. 1]

**IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

Civil Action No. 60-562-S

GILBERTVILLE TRUCKING CO., INC., L. NELSON & SONS TRANSPORTATION COMPANY, CHARLES G. CHILBERG, CLIFFORD J. O. NELSON, GRETA C. CARLSON, AND KENNETH A. H. NELSON, Plaintiffs,

v.

THE UNITED STATES OF AMERICA, Defendant.

COMPLAINT—Filed August 8, 1960.

Plaintiffs Gilbertville Trucking Co., Inc., The L. Nelson and Sons Transportation Company (both corporations), Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson and Kenneth A. H. Nelson, for their complaint herein allege:

1. This action is brought pursuant to the provisions of Chapters 85, 87, 155 and 157 of the Judicial Code (Title 28, United States Code, Sections 1336, 1398, 2284, 2321-2325), to enjoin, annul and set aside three orders of the Interstate Commerce Commission (hereinafter called the Commission) entered against plaintiffs in a proceeding instituted by the corporate plaintiffs known as "No. MC-F-6099, The L. Nelson & Sons Transportation Co.—Control and Merger—Gilbertville Trucking Co., Inc." (60 M.C.C. 257) and in a proceeding conducted jointly therewith known as "No. MC-F-6178, The L. Nelson & Sons Transportation Co.—Investigation of Control—Gilbertville Trucking Co., Inc.", and to require the Commission to reopen said proceedings for further consideration. The aforementioned orders entered on June 9, 1959, February 15, 1960, and July 5, 1960, respectively, are based upon a report of the Commission (three Commissioners dissenting and three not participating) filed

in said proceedings on June 9, 1959 (hereinafter called the Commission's report). A copy of the Commission's report is annexed hereto as Appendix A. A copy of the Commission's order of June 9, 1959 is annexed hereto as Appendix B. Copies of the Commission's orders of February 15, 1960 and July 5, 1960 entered upon the petitions of L. Nelson & Sons Transportation Company for reopening, reconsideration and an alternative method of eliminating the business practices the Commission found to be unlawful, are annexed hereto as Appendices C and D, respectively.

[fol. 2] 2. Plaintiff, Gilbertville Trucking Co., Inc., is a motor carrier corporation, organized and existing under and by virtue of the laws of the State of Massachusetts, with a principal office and place of business in the City of Worcester, Commonwealth of Massachusetts, located in the Judicial District of Massachusetts.

3. Plaintiff, L. Nelson & Sons Transportation Company is a motor carrier corporation, organized and existing under the laws of the State of Connecticut, with a principal office and place of business in Ellington, Connecticut. It has authorized capital of 500 shares common stock, of which 494 shares are outstanding, and 6 shares are Treasury stock.

4. Plaintiff, Charles G. Chilberg, of Rockville, Connecticut, is President, Treasurer, a Director and owner of 226 shares (45.75%) of the stock of L. Nelson & Sons Transportation Company.

5. Plaintiff, Clifford J. O. Nelson, of Dover, Massachusetts, is Assistant Treasurer, Clerk, a Director and owner of 226 shares (45.75%) of the Stock of L. Nelson & Sons Transportation Company.

6. Plaintiff, Greta C. Carlson of West Granby, Connecticut, is a Director and owner of 42 shares of the stock of L. Nelson & Sons Transportation Company.

7. Plaintiff, Kenneth A. H. Nelson, of Manchester, Connecticut, is President, Treasurer and owner of all of the issued and outstanding stock of Gilbertville Trucking Co., Inc.

8. The Corporate Plaintiffs are both common carriers by motor vehicles, performing service in interstate or foreign commerce, and as such are subject to the provisions of the Interstate Commerce Act, as amended, (Title 49, United States Code, (hereinafter called the Act)), including Sections 5 (2), 5 (4), 5 (5), 5 (6) and 5 (7) thereof.

9. Defendant is the United States of America.

10. Plaintiff, Gilbertville Trucking Co., Inc., is authorized under certificate No. MC-87431 issued to it by the Commission, to transport general commodities, with certain exceptions, principally over irregular routes, between points in the states of Massachusetts, Rhode Island, Connecticut, and points in New York and New Jersey within 20 miles of New York City; and certain specific commodities over specified regular routes and irregular routes between points in the above described area plus such points as Philadelphia, [fel. 3] Pa. and Rockland, Delaware.

11. Plaintiff, The L. Nelson & Sons Transportation Company, is authorized under Certificate No. MC-42871, Sub. 3, issued to it by the Commission to transport in interstate or foreign commerce (a) materials used in the manufacture of cloth, waste material resulting therefrom, and supplies and materials used in connection with transportation or processing of such commodities when moving to or from places of processing, except liquid commodities, in bulk, in tank vehicles, over irregular routes, (1) between Hudson, North Chelmsford, Norton, Lowell, Lawrence, and Marlboro, Mass. on the one hand, and on the other, Manchester, Concord and Somersworth, N.H. and points in Providence and Bristol Counties, R.I.; (2) between Providence, Woonsocket and Pawtucket, R.I., Hartford, Hazardville and Somersville, Conn., and points in Massachusetts east of the Connecticut River, on the one hand, and on the other, New York, N.Y., Jersey City, Passaic, Newark and Camden, New Jersey, Philadelphia, Pa. and points in Pennsylvania within 30 miles of Philadelphia; (3) between Hazardville, on the one hand, and, on the other, Millbury and East Douglas, Mass.; (4) from Philadelphia, Pa. and Camden, N.J. to points in Tolland and Hartford Counties, Conn. on and

north of U.S. Highway 6; and (b) empty containers used in transporting the commodities named above over irregular routes from the said points in Tolland and Hartford Counties, to Philadelphia and Camden.

12. While the motor carrier operations of the two corporate plaintiffs are in the same general areas, due to the limitation in Nelson's operating authority to textiles and the limitation primarily to point to point operation, it is not competitive to a material extent with the general commodity operations of Gilbertville.

13. During the year 1955, the stockholders and Boards of Directors of the corporate plaintiffs concluded that it would be desirable to merge the operating rights and other properties of the two respective corporations.

14. On August 18, 1955, the separate Boards of Directors of the two corporate plaintiffs authorized the application to the Interstate Commerce Commission for authority under Section 5 of the Act for the control of Gilbertville Trucking Co. and for the merger of the operating rights and property of said company with those of The L. Nelson & Sons Transportation Company.

15. On October 6, 1955, joint application was filed with the Commission by the corporate plaintiffs under Section 5 (2) of the Act (hereinafter called the application), for [fol. 4] authority to control, through exchange pro-rata of the shares of stock of Gilbertville Trucking Co., Inc. for shares of The L. Nelson and Sons Transportation Company, and for merger of the operating rights and property of the former into those of the latter. The application (assigned Docket No. MC-F-6099) was made on the ground that the proposed control and merger would be in the public interest and in the interest of the corporate plaintiffs for the following reasons, among others:

(a) The trend in the Textile Industry to relocate plants in the South, has resulted in unbalanced loading for The L. Nelson & Sons Transportation Company, whose authority under certificate No. MC-42871, issued by the Commission, is limited to service to the Textile industry:

(b) Merger of the operations and properties would result in elimination of wasteful transportation, since both companies dispatch trucks daily to the same general areas; and would permit greater utilization of equipment and manpower;

(c) Merger would permit effectuation of numerous economies and improvements in service which the corporate plaintiffs would not otherwise be able to accomplish; and

(d) Merger would strengthen the financial and operating position of the surviving company so as to permit improved efficient operations, and to assure the continuance in the future of adequate service to the shipping public which has relied on and utilized the services provided under the operating authorities of Gilbertville Trucking Co., Inc. and The L. Nelson & Sons Transportation Company since long prior to the passage of the Motor Carrier Act in 1935.

16. The Commission is authorized under Section 17 of the Act to divide its members into as many divisions as it may deem necessary. As a result of that authority the Commission for many years has one division designated as Division 4 to which it has directed matters before it involving, among other things, applications under Section 5 (2) of the Act, known as Finance Dockets. The application of the corporate plaintiffs was directed to Division 4 and the proceeding thereon was assigned Finance Docket No. 6099.

17. By order entered December 20, 1955, assigned Docket No. MC-F-6178, the Commission instituted the investigation proceeding referred to in paragraph 1 hereof under Section 5 (7) of the Act, for the purpose of inquiring into and [fol. 5] concerning the possibility that the control and management of the Gilbertville corporation in a common interest with the Nelson corporation may have been effectuated in violation of Section 5 (4) of the Act, and referred that proceeding to an Examiner for hearing on a joint record with hearings on plaintiffs' application.

18. After long delay, an extensive joint hearing extending from September 17th through September 27th, 1956,

was held before an Examiner on the aforementioned proceedings. Evidence was adduced at the hearing on the questions whether the plaintiffs were in violations of Section 5 (4) of the Act and whether, even if so, approval of the finance application would be consistent with the public interest. Certain rail and motor carriers appeared in opposition at the hearing, but offered no evidence as to alleged violations of Section 5 (4).

19. On June 6, 1957, the Examiner served his proposed report of recommended findings. That report which is annexed hereto as Appendix E, although concluding that plaintiffs had technically violated Section 5 (4) of the Act because of certain acts, practices and arrangements, *no one of which afforded a clear indication of control or management in a common interest*, found that the finance proceeding under Section 5 (2) would be consistent with the public interest, and should be approved subject to certain conditions; and that upon consummation of the finance transaction, the investigation proceeding be terminated.

20. Thereafter, exceptions to the report of the Examiner were filed by plaintiffs, the Commission's Bureau of Inquiry and Compliance, and certain other interveners.

21. On February 26, 1958, a Division 4, comprised of Commissioners Winchell, Minor and Walrath, (Commissioner Winchell dissenting) issued its report (a copy of which is annexed hereto as Appendix F) in which the factual statements in the Examiner's report were adopted. Division 4 concurred in the Examiner's conclusion as to the violation of Section 5 (4) of the Act, but stated that because of such violation the finance transaction in docket No. MC-F-6099 "has not been shown to be consistent with the public interest, and that the application accordingly should be denied."

22. Thereafter, the corporate plaintiffs filed a petition for reconsideration and exceptions to the findings of division 4. Replies to those petitions were filed by the Commission's Bureau of Inquiry and Compliance and certain of the other parties who appeared in opposition.

23. Thereafter by order dated October 2, 1958, a copy of which is annexed hereto as Appendix G, Division 4 of the Commission ordered:

"That the proceedings be, and they are hereby reopened for reconsideration on the present record."

24. However, the Full Commission issued its report decided June 9, 1959 (Appendix A hereto) in which without explanation at sheet 3 states: "We have recalled the proceedings from the division, for consideration and determination in this report." Said report denied plaintiffs' application.

25. By order entered June 9, 1959, (Appendix B, hereto) the Commission ordered plaintiffs to:

(a) "Terminate the violation of the provisions of Section 5 (4) found in said report to have been accomplished".

(b) "Divest themselves of any and all interest which they may have in the capital stock of Gilbertville Trucking Co., Inc.,..."

(c) Report to the Commission within 60 days from the effective date thereof the action taken by them to comply therewith.

26. That order (Appendix B hereto) expressly recited that the report of the Commission entered June 9, 1959 (Appendix A hereto) and the prior report of division 4 dated February 26, 1958 (Appendix F hereof) were made a part thereof.

27. On August 17, 1959, prior to the effective date of said order (Appendix B hereto) as extended by the Commission, plaintiffs filed petition for reopening, and reconsideration of the June 9, 1959 order; which was denied by order of the Commission dated February 15, 1960. (Appendix C hereof.)

28. On March 7, 1960, prior to the effective date of the order of February 15, 1960, a further petition was filed

with the Commission requesting, as an alternative method for compliance with the divestment order, cancellation of the outstanding certificates of The L. Nelson & Sons Transportation Company, and simultaneous with such cancellation that the Commission vacate and set aside the order of June 9, 1959, and other orders involved in this proceeding. Such petition was denied by order of the Commission dated July 5, 1960. (Appendix D hereof.)

29. The Commission extended the effective date of its orders pending consideration of plaintiffs' two petitions. The order of July 5, 1960, (Appendix D), was set to become [fol. 7] effective on July 20, 1960. Under date of July 18, 1960 (Appendix H), the Commission extended the effective date to August 15, 1960.

30. The report of the Commission is erroneous in law, arbitrary and contrary to, and without support in the evidence, in excess of the Commission's powers under the Act, and a denial to plaintiffs of rights assured to it under the Act. Accordingly, the orders of the Commission denying the authority sought by plaintiffs herein are null and void and should be set aside, and the Commission should be required by appropriate order of this Court to reconsider the matter and to enter an order in accord with the law and the evidence.

31. Without limiting the generality of the allegations of paragraph 30, above, the *minority* of the Commission that decided the report erred as a matter of law and in making its report and entering its said orders, acted arbitrarily and contrary to, and without support in the evidence in the following respects, among others:

(a) in concluding that the Examiner made no error in his rulings at the hearing, which rulings were prejudicial to plaintiffs;

(b) in condoning the apparent collusion between the Commission's Bureau of Inquiry and Compliance and the Examiner which resulted in the application proceeding being *used* as a vehicle for investigation, all to the end that a full and fair hearing was denied and prevented in the application proceeding;

(c) in recalling the proceedings from the division and reversing its order of October 2, 1958 to reopen the matter for reconsideration, see paragraphs 23 and 24, hereof;

(d) in condoning, by failing to reverse and overrule, a series of erroneous rulings at the hearing and during the appeals, which rulings had the effect of leaving unrebutted partial or half-truths which were taken to support the Commission's findings while preventing evidence that would have modified by full disclosure the business methods pursued by plaintiffs;

(e) in basing its conclusions on hearsay evidence introduced through Commission personnel by the Commission attorney before a Commission Examiner;

(f) in concluding that the result of a series of admittedly legal acts constituted a violation of the Act without stating in its report and orders as required by law the reasons or basis for the findings and conclusions contained therein upon the material issues of fact, law, or discretion presented [fol. 8] on the record.

32. The threatened enforcement of the Commission's orders of June 9, 1959, February 15, 1960, and July 5, 1960 (Appendices B, C, and D hereto), will immediately adversely and irreparably injure plaintiffs in that, among other things:

(a) The Commission's orders of June 9, 1959, February 15, 1960, and July 5, 1960 (Appendices B, C and D hereto) confront all plaintiffs with the requirement of divesting themselves of all interest in one of the corporate plaintiffs, Gilbertville Trucking Co., Inc., when in fact all of the stock in said corporate plaintiff is owned by only one plaintiff, Kenneth A. H. Nelson, who is not in any way an employee, officer, director, stockholder, or otherwise financially connected with the other corporate plaintiff, The L. Nelson & Sons Transportation Company,

(b) Said Commission's orders would leave plaintiff Kenneth A. H. Nelson with the requirement of selling his business at a time when the Commission's acts have notified all

potential buyers of said plaintiff's requirement, thereby destroying any market for his business,

(c) Said Commission's orders would further leave plaintiff Kenneth A. H. Nelson without a livelihood without reason therefor,

(d) Said Commission's orders require plaintiffs to terminate the violation of provisions of the Act without specifying which of the actions of plaintiffs constituted a violation of the Act and, in fact, while relating that none of the actions of the plaintiffs constituted a clear indication of control or management in a common interest,

(e) Plaintiffs by reason of the wholly arbitrary and improper denial of their application will be unable to put into effect the many benefits, including transportation and other economies, which would accrue to plaintiffs (as well as to the public) should the application be granted.

33. Plaintiffs have no adequate remedy at law.

Wherefore, plaintiffs having exhausted their administrative remedies before the Commission, pray:

1. That a Court, constituted as required by Sections 2284 and 2321-2325 of the Judicial Code (Title 28, United States Code), be convened and that said Court so constituted and convened shall hear and determine this action;

[fol. 9] 2. That said Court so constituted and convened, pending final hearing and determination of this action, shall enter an order granting an interlocutory injunction restraining the enforcement, operation or execution, in whole or in part, of said orders of June 9, 1959, February 15, 1960, and July 5, 1960.

3. That upon final hearing of this action a permanent injunction issue declaring that said orders of the Commission of June 9, 1959, February 15, 1960, and July 5, 1960, are null and void, and that they be enjoined, annulled and set aside, and that their enforcement, execution and operation be forever enjoined.

4. That the proceedings be remanded to the Commission for reconsideration in conformity with the applicable law and the evidence; and

5. That plaintiffs be granted such other and further relief as may be proper in the premises including the costs and disbursements of the action.

August 5, 1960

Mary E. Kelley, 10 Tremont Street, Boston 8, Massachusetts, LA 3-6353.

John J. Graham, 122 Bowdoin Street, Boston, Massachusetts, RI 2-1708.

[fol. 10] *Duly sworn to by Mary E. Kelley, jurat omitted in printing.*

[fol. 12]

APPENDIX "A" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

DATE OF SERVICE
JUN 15 1959

No. MC-F-6099¹

THE L. NELSON & SONS TRANSPORTATION Co.—CONTROL
AND MERGER—GILBERTVILLE TRUCKING Co., INC.

Decided June 9, 1959.

Upon reconsideration:

1. In No. MC-F-6099, application of The L. Nelson & Sons Transportation Co., for authority to acquire control of Gilbertville Trucking Co., Inc., through purchase of capital stock, for merger into the former of the operating rights and property of the latter for ownership, management and operation, and for the acquisition by Clifford J. O. Nelson and Charles G.

¹ This report embraces No. MC-F-6178, The L. Nelson & Sons Transportation Co.—Investigation of Control—Gilbertville Trucking Co., Inc.

Chilberg of control of the operating rights and property through the control and merger, denied.

2. In No. MC-F-6178, control and management of Gilbertville Trucking Co., Inc., in a common interest with The L. Nelson & Sons Transportation Co., found to have been effectuated and to be continuing in violation of section 5(4), Interstate Commerce Act. Order entered directing termination of such violation. Prior report 75 M.C.C. 45.

Appearances as shown in the prior report.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

In the prior report, 75 M.C.C. 45, decided February 26, 1958, by division 4, (1) in No. MC-F-6099, authority was withheld under section 5 of the Interstate Commerce Act for the acquisition by The L. Nelson & Sons Transportation Co., of Ellington, Conn., of control of Gilbertville Trucking Co., Inc., of Gilbertville, Mass., herein called Nelson and Gilbertville, respectively, through purchase of capital stock, the concurrent merger of the operating rights and property of Gilbertville into Nelson for ownership, management, and [fol. 13] operation, and for Clifford J. O. Nelson, of Dover, Mass., and Charles G. Chilberg, of Rockville, Conn., who control Nelson through ownership by each of 45.8 percent of its outstanding capital stock, to acquire control of Gilbertville through the transaction, and (2) in No. MC-F-6178, it was found that the control and management of Nelson and Gilbertville in a common interest had been effected and was continuing in violation of section 5(4) of the act; that the respondents, Nelson, Gilbertville, Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson, and Kenneth A. H. Nelson had participated in accomplishing such control and management in a common interest and in its continuance; and that respondents should terminate the violation. An order was entered denying the application in No. MC-F-6099, ordering termination of the violation, and requiring

certain respondents to report within 60 days the steps taken by each to comply.

By petition filed April 21, 1958, petitioners sought reconsideration of the report and order of February 26, 1958, or in the alternative, oral argument. Replies were filed by our Bureau of Inquiry and Compliance, herein called the Bureau, and joint replies were filed by (1) The Adley Express Company, M. & M. Transportation Company, and Hemingway Brothers Interstate Trucking Company, herein called the Adley group, (2) P. B. Mutrie Motor Transportation, Inc., Alvin R. Holmes, doing business as Holmes Transportation Service and/or Jones Express, Newburgh Transfer, Inc., and Taylor's Express Co., herein called the Mutrie group, and (3) Downing & Perkins, Inc., H. T. Smith Express Company, Lombard Bros., Inc., and National [fol. 14] Transportation Company, herein called the Downing group. A motion to strike portions of the petition of petitioners was filed by the Downing group, and a motion to strike the entire petition was filed by class I rail carriers in eastern territory, both on the basis that the petition contained redundant, immaterial, impertinent, or scandalous matter in violation of Rule 1.4(d) of the Commission's Rules of Practice. The Downing group also alleged that the petition contained new material not properly for consideration at this time. Petitioners replied to the motions. Motions to strike portions of the replies of the Bureau and the Mutrie group were filed by petitioners and the Bureau replied. By order of October 2, 1958, Division 4 reopened the proceedings for reconsideration on the present record. We have recalled the proceedings from the division, for consideration and determination in this report. Contentions raised by the petitioners and protestants not detailed herein have been considered and are deemed without merit.

Petitioners argue that the motion of "Class I rail carriers" to strike their petition for reconsideration should be dismissed, as the complaining parties are not fully identified; that it is doubtful all of the eastern railroads have agreed to the motion; and that the rail carrier protestants presented no evidence in the proceeding and their position is unknown. They also contend that the persons preparing the motion did not participate in the hearing.

and are unfamiliar with the matters involved. In our opinion, the arguments of petitioners are without merit. The rail carrier association has participated in the proceedings [fol. 15] from the beginning and if petitioners desired more detailed information as to the specific membership of the association, they should not have waited until this late date. The contentions of the rail carriers adequately reflect their interest and position in the proceedings. The attorney preparing the motion, although different from the attorney participating at the hearing and the attorney preparing other pleadings in this proceeding, is a representative of the association or of a member thereof, and without evidence to the contrary, we must assume he was authorized to take the action he did. See *Illinois-Minnesota M. Car. Conference, Inc. v. E. L. Murphy*, 64 M.C.C. 242, and the cases cited therein.

In respect of the motion of the Downing group and of the rail carriers to strike specific portions of the petition of applicants for reconsideration, we agree that most of the matter specifically complained of is immaterial, irrelevant, scandalous, or impertinent, and as such is objectionable and properly excludable under the provisions of Rule 1.4(d) of the Commission's Rules of Practice. *Keith Ry. Equipment Co. v. Assn. of American Railroads*, 274 I.C.C. 469, 471, and *Gums and Resins from the East to the Pacific Coast*, 297 I.C.C. 435, 437. The motion of the Downing group and of the rail carriers to strike specific portions of the applicants' petition for reconsideration, to the extent any of those portions have not been considered elsewhere in this report, will be granted.

As to the motion of petitioners to strike certain portions of the reply of the Bureau, we agree that the portions of [fol. 16] such reply wherein reference is made to "wandering dissertation" and "unintelligible discussion" should be stricken from the record, and in this respect the motion of petitioners will be granted. We do not consider the other matter complained of as objectionable or beyond the scope of the interest of the Bureau in these proceedings, and the motion of petitioners in all other respects, will be denied.

Petitioners also request that certain portions of the reply of the Mutrie group be stricken from the record, as not supported by the evidence or beyond the scope of their

interest in these proceedings. Particularly they object to statements made relative to matters involved in the investigation proceeding or to the nature of the operations performed by Gilbertville, prior to March, 1953, such as:

If the Interstate Commerce Act and the regulations of the Commission pursuant thereto are to be meaningful, the Commission must take a strong stand in withholding its approval where it is obvious as it is here that Applicants seek approval *nunc pro tunc* of a transaction which already is a *fait accompli*. [sic]

It seemed clear that Gilbertville's certificate could not have been transferred to Vendee in a Section 5 proceeding in March of 1953, or whatever time a member of the Nelson family actually acquired control, because the certificate was basically dormant at that time.

Petitioners assert that the said protestants presented no evidence in the investigation proceeding and that, as to the nature of the operations of Gilbertville prior to March 1953, they successfully prevented the introduction of evidence at the hearing which would have established the continuity of such operations. It is true that the protestants presented no evidence in the investigation proceeding, and [fol. 17] the question of the nature of the operations performed by Gilbertville prior to March 1953, is too remote to be controlling of our conclusions herein. However, the argument in the reply of protestants does not alter their basic position in the section-5 proceeding, and it is clear that their appearance and interest is in support of the Bureau in the investigation case. We do not consider any of the arguments in question as objectionable, requiring that it be stricken from the record. The motion of petitioners in this respect is overruled.

In their petition for reconsideration, petitioners argue that the division erred in finding Nelson and Gilbertville had violated the provisions of section 206 and certain regulations of the Commission, in that it had conducted unlawful operations and failed to maintain safety equipment on vehicles or to keep vehicles in safe operating condition. They assert there is no evidence of record to sustain such

conclusions; that these claimed violations, in any event, are not properly for consideration in these proceedings; and that the parties have been deprived of a full and complete hearing in violation of their constitutional rights. They further argue that the division erred in finding that Nelson and Gilbertville are controlled and managed in a common interest in violation of section 5(4), pointing out that the examiner, although reaching the same conclusion, had found the question to be a borderline case. They assert that the cases cited by the division to support its conclusions, particularly *Smithsons Holding—Control—Ontario Freight Lines Corp.*, 70 M.C.C. 623, and *G. B. Powell—Purchase—Rampg*, 57 M.C.C. 597, are not in point, [fol. 18] because no ulterior motive has been shown to exist as the basis for the purchase by Kenneth Nelson of the stock of Gilbertville, that he secured advice from other family members, or that the parties involved have been guilty of flagrant violations of the act and the regulations of the Commission. They contend that the fact Gilbertville and Nelson shared the same facilities in Connecticut and the relationship of the parties was well known to the Commission prior to the filing of the section 5 application; that the division failed to give consideration to the efforts of both Nelson and Gilbertville to comply with all the rules and regulations of the Commission; and that the conclusion that the transaction in No. MC-F-6099 would not be consistent with the public interest is not supported by the weight and preponderance of the evidence.

Petitioners further argue that the division erred in finding that the protestant carriers who appeared in opposition to the section 5 transaction also appeared as interested parties in the investigation, contending, in this respect, that such protestants took no part or interest in the investigation proceeding, presented no evidence therein, and have not, in fact, alleged any violations of the act by either Nelson or Gilbertville. They allege that the division erred in substituting suspicion for facts in finding that since March, 1953, the stock of Gilbertville had been owned by Kenneth Nelson or those closely affiliated with him; in basing the unlawful common control conclusion on the activities of Kenneth Nelson prior to his purchase of the stock

[fol. 19] of Gilbertville; and on the division of interline revenues between Nelson and Gilbertville; and in reaching its conclusions without considering that the applicants-respondents had received no prior warning that any of their activities were unlawful and thereby were deprived of an opportunity to correct any deficiencies. They contend that the division erred in relying on suspicion and innuendo to justify the conclusions that applicants-respondents had violated the provisions of section 206 of the act and the regulations of the Commission; in failing to find that the transaction would be in the public interest; and in failing properly to consider the evidence of record and the supplemental data submitted with their exceptions to the examiner's report to justify the retention of authority for the transportation of sanitary napkins, facial tissues, and paper boxes, between New York, N. Y., and Wilmington, Del. Applicants-respondents further allege that the division should not use double standards to deny this application, involving small carriers, on the grounds of unlawful control, while on the other hand, finding consistent with the public interest an acquisition by the St. Louis-San Francisco Railway Company of stock control of the Central of Georgia Railway Company, and discontinuing an investigation proceeding involving those carriers in Finance Docket No. 19159, *Central of Georgia Railway Company Control*, embracing Docket No. 31977, *Central of Georgia Railway Company Investigation of Control*, — I.C.C. —, de-[fol. 20] cided July 9, 1957, herein called the Central of Georgia case.² Lastly, they question the validity of the order of February 26, 1958, asserting that it demands they cease violations of the act which are unknown, unlisted, and unspecified.

² In a report on reconsideration in the *Central of Georgia* case, decided November 14, 1958, the Commission reversed the decision of July 9, 1957, by division 4, and denied the application of the St. Louis-San Francisco Railway Company for authority to acquire control of the Central of Georgia Railway Company through ownership of capital stock, and ordered that the St. Louis-San Francisco Railway Company terminate its power to control or manage the Central of Georgia Railway Company either through disposition of the stock to uninterested parties or the transfer thereof to a corporate trustee or trustees. The effective date of that order has been postponed to allow consideration of a petition for reconsideration.

The Bureau and the protestant motor carriers, collectively and generally argue in their replies, that the petitioners have failed to show wherein the division erred, and that its conclusions are adequately supported by the evidence of record and its findings should be affirmed. They contend that the petitioners' allegations of error are not based upon facts but principally on false assumptions, unwarranted accusations, or incorrect, distorted, and unsupported arguments. The Bureau further contends that petitioners seek to misrepresent the true context of a stipulation between it and petitioners relative to the lawful observance by the carriers of an authorized gateway area; that the evidence, as detailed by the examiner in his report, clearly shows the petitioning carriers have violated the act; that the parties cannot plead they were surprised by the investigation proceeding as they received adequate prior warning that the Commission questioned their relationship; that they were forewarned of the evidence to be presented by the [fol. 21] Bureau in the investigation proceeding; that the act declares certain action to be unlawful per se and whether the parties possessed ulterior motives is not controlling; that counsel for applicants-respondents would deprive the Commission of its right to receive evidence and make findings regarding fitness in a section 5 proceeding; that it is clear the application under section 5 was filed to legalize an unlawful existing situation; that in the cases cited by applicants wherein unlawful control existed and the applications were approved, mitigating circumstances existed, whereas none exist in the instant proceedings; that no public interest has been shown to justify approval of the section 5 application; and that a strong transportation system cannot be achieved by rewarding parties for their misconduct. Protestant motor carriers concur in the findings of the division and its rejection of data submitted by petitioners with their exceptions to the examiner's report purporting to show operations under Gilbertville's authority to transport sanitary napkins, facial tissues, and paper boxes. In our opinion, rejection of the data submitted by applicants-respondents with their exceptions was proper under Rule 1.86 of the General Rules of Practice.

As stated in the prior report, none of the parties, including applicants-respondents, have disputed the factual statements of the examiner in his report, which were generally adopted in the prior report of the division. Petitioners, however, contend that such facts are not sufficient to justify the conclusion in the prior report that the control and [fol. 22] management of Nelson and Gilbertville in a common interest had been accomplished and are continuing in violation of section 5. They contend that at most, a borderline case is presented as found by the examiner, and that, as a rule, the relationship of Gilbertville and Nelson, in their operations, as detailed in the prior report and the report of the examiner, are not unusual between motor carriers generally.

The evidence shows that Mrs. Linnea Nelson, with two of her seven children, Charles and Oscar Chilberg, inaugurated the business of Nelson as a partnership in 1930. It was incorporated in 1947. As of May 14, 1948, of the 500 shares of authorized capital stock outstanding, 300 shares were held by Mrs. Nelson and 50 shares each by Charles and Oscar, and Clifford and Kenneth Nelson. Mrs. Nelson died in 1950 and her stock, less 6 shares which subsequently became treasury stock, was devised 42 shares each to her seven children. In June and September, 1951, and in January, 1953, Oscar and Kenneth sold their stock (92 shares each) to Charles and Clifford, respectively, and resigned from the business. Since the latter date Charles and Clifford have held 226 shares each of the capital stock of Nelson. Kenneth and Oscar have been neither officers nor directors since 1951. However, from September 1, 1951, to March 1, 1953, Kenneth had an office at one of Nelson's terminals where as a "free lance" tariff consultant, he served only Nelson, and was paid by Nelson \$15,650 in 1952 and \$13,829 in 1953.

Under a contract of March 2, 1953, after consultation with his accountant and financial adviser, Kenneth agreed to purchase the capital stock of Gilbertville, consisting of 100 [fol. 23] shares, for a net consideration of \$22,447, of which \$10,000 was evidenced by a promissory note signed by him and Oscar. A loan of \$30,000 was secured from a bank on a note signed by the same individuals to help finance the transaction and to furnish Gilbertville with working capital.

Upon the transfer of that stock 51 shares were held by Kenneth, 48 by Oscar, and 1 share by Kenneth's attorney. In March, 1954, Oscar transferred his shares to Kenneth who, in turn, transferred 24 shares each to his wife and to the manager of their terminal at Gilbertville, apparently in name only.

The Bergson Company, organized January, 1953, is a real estate holding company, whose 490 shares of stock are owned in equal amounts by the seven children, and they are its directors. Kenneth is not an officer of Bergson. Of the five terminals utilized by Nelson in its operations, four are leased from Bergson, including a terminal at Rockville-Ellington, Conn., which is also used as the headquarters of both Nelson and Gilbertville. The latter subleases terminal facilities from Nelson at Rockville-Ellington, Newton, Mass., and Woonsocket, R.I., owned by Bergson, and at New York City, owned by other parties. At a garage and repair shop maintained at Rockville-Ellington, Nelson performs about 25 percent of the repair work on the equipment of Gilbertville.

At two of the terminals owned by Bergson, at the one in New York City, and at four other points, Nelson and Gilbertville have the same telephone numbers. The total cost of [fol. 24] leased interterminal telephone lines is \$1,400 a month and Gilbertville pays Nelson \$400 a month as sub-lessee. Nelson occasionally leases equipment from Gilbertville although the latter constantly and frequently leases from a pool of equipment maintained by Nelson. Both draw upon the same group of drivers and information relative thereto, including medical certificates, are maintained in the files of both companies. To the extent they interline, revenues are divided on a fixed percentage basis and Nelson does all of the billing for such traffic. Frequently the same driver will be employed by both companies during the same pay period, and on those occasions where a shipment moves from a point in the territory of one to a point in the territory of the other the same driver and vehicle will perform the through movement under prearranged lease arrangements. The two companies use the same source for accounting and financial advice, each operates to some extent, at least, under managerial direction from officers of the other.

and they are liberal with each other in the settlement of intercompany accounts. There has also been a commingling of traffic of the two carriers in the same vehicles whenever it suits their convenience.

As of March, 1953, Gilbertville had one truck, three tractors, and four trailers, and had a deficit in surplus of \$39,868. As of December 31, 1953, however, it had a net worth of \$18,935. In 1953 Gilbertville's revenues were \$75,489, whereas for the first seven months of 1956 they had increased to \$444,777. Its equipment increased substantially during that period. In 1953 the revenues of Nelson were \$895,774, and for the first seven months of 1956 they were [fol. 25] \$630,607. Under an authority granted by this Commission, Gilbertville, on June 16, 1954, acquired the operating rights of one Louis Marner, doing business as Wolff's Express. In April or May of 1954, Charles Chilberg and Clifford Nelson negotiated for the capital stock of R. A. Byrnes, Incorporated, herein called Byrnes, and upon approval of this Commission, the transaction was consummated August 21, 1956. The general-commodity authority of Byrnes complements that of Gilbertville and by interchange a through service on general commodities can be provided between points in Massachusetts, Rhode Island, and Connecticut, on the one hand, and, on the other, points south thereof to the District of Columbia. Considering all facts of record, we are of the opinion, and find, that Kenneth Nelson was affiliated with Nelson within the meaning of section 5(6) at the time he purchased the stock of Gilbertville, and that the conclusive presumption of section 5(5) applies; we affirm the findings in the prior report, and in the report of the examiner, that the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing in violation of section 5(4) of the act.

It has been consistently found in many reports in proceedings under section 5, involving motor carriers, that a prior unlawful consummation of a transaction for which authority is sought, or the unlawful accomplishment of the control or management in a common interest of the carriers involved, is not an absolute bar to approval of the transaction. The [fol. 26] law violation has been viewed as only one of the ele-

ments to be considered. A similar view has been expressed in determining applications for certificates under sections 207 of the act, past violations of law by such applicants having been considered in appraising their fitness to hold the authority sought. Thus, some applications have been granted under section 5 in spite of the unlawful control, *Baggett—Control—Walker Hauling Co., Inc.*, 65 M.C.C. 522, *Masten Transp., Inc.—Merger*, 70 M.C.C. 421, and *Atlas Van-Lines, Inc.—Control and Merger*, 70 M.C.C. 629, and 75 M.C.C. 175; and some have been denied, *Hughes—Control—M.P. & St. L. Exp., Inc.*, 70 M.C.C. 261, *Deaton Truck Line, Inc.—Pur.—Capitol Freight Lines, Inc.*, 70 M.C.C. 355, and *Woodworth—Purchase—Griffin*, 70 M.C.C. 520. In a recent report on reconsideration, in Finance Docket No. 19159, *Central of Georgia Railway Company Control*, — I.C.C. —, decided November 14, 1958, where we found that the control of the Central of Georgia Railway Company had been acquired by the St. Louis-San Francisco Railway Company in violation of section 5(4), we stated:

We agree with division 4 that such violation is not necessarily a bar to approval of an application under section 5(2), if, upon consideration of all the facts, it clearly appears that the public interest will be served best by such approval. In our opinion, such is not the case here. The public interest is concerned not only with improvements in transportation service, but also with the maintenance of respect for and the observance of the law. If Frisco is permitted to retain the fruits of its unlawful conduct, and we sanction such conduct, which we consider to have been in flagrant disregard of the law, others will be encouraged to pursue a like course and to present a *fait accompli* for our approval. [fol. 27] Obviously, such is not in accord with the intent of the statute, i.e., that we pass upon 'proposed' acquisitions of control prior to their consummation, including the justness and reasonableness of the terms upon which such control is to be acquired. If the indicated practice were generally followed, our administration of the statute in the public interest would be seriously hindered, if not defeated.

We affirmed, in the foregoing, the views heretofore followed, that law violations are not necessarily a bar to approval of an application, if the public interest will best be served by approval of the transaction presented. In this respect, in the prior report of Division 4, it was stated:

When regulation of motor-carrier transportation under the act was in its earlier stages, there were many instances when transactions under section 5 were approved notwithstanding a showing of law violation, because the paramount public interest warranted approval. Now, after more than 20 years of regulatory experience, a more stringent approach is warranted not as a penalty to these particular respondents, but in recognition that a violation of the law should not be rewarded, and that existing carriers endeavoring faithfully to comply with the law should be encouraged and protected. It should be emphasized that Nelson's and Gilbertville's principals are not new to transportation or to section 5 proceedings. * * * Considering all the circumstances, we are of the opinion that the violations of the law and of the regulations should not be 'blessed' by approval * * * but rather, that respondents should be directed to terminate the unlawful control and management in a common interest.

We have carefully considered the evidence and the pleadings, and find no error in the findings and conclusions in the prior report, or other basis upon which to arrive at a conclusion different than that reached in the *Central of Georgia case*, supra, or to support a finding that the transaction for which authority is sought would be consistent with the public interest under all the circumstances.

We find, in No. MC-F-6099, that the transaction has not been shown to be consistent with the public interest, and that the application accordingly should be denied.

[fol. 28] We further find, in No. MC-F-6178, that the control and management of The L. Nelson & Sons Transportation Co., in a common interest with Gilbertville Trucking Co., Inc., has been effectuated and is continuing in

violation of section 5(4) of the Interstate Commerce Act, and that the respondents The L. Nelson & Sons Transportation Co., Gilbertville Trucking Co., Inc., Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson, and Kenneth A. H. Nelson, participated in the effectuation of such control and management in a common interest, and in its continuance.

An appropriate order, which will deny the application and require the respondents named above to terminate the violation of section 5(4) of the act, will be entered.

COMMISSIONER FREAS, concurring in the result:

I agree with the findings of the report that the control and management of Nelson in a common interest with Gilbertville has been effectuated in violation of section 5(4) of the act that the transaction has not been shown to be consistent with the public interest, and that the application should, therefore, be denied. The latter conclusion is warranted, in my opinion, not so much because of any evidenced disregard of the law, but principally because of a lack of a clear showing that there is a paramount overriding public interest which would best be served by a grant of the approval sought.

[fol. 29] COMMISSIONER HUTCHINSON dissenting:

On the record as a whole I would find the transaction to be consistent with the public interest and affirm the findings in the report of the hearing examiner.

COMMISSIONER McPHERSON dissenting:

For the reasons set forth in the dissenting expression in Finance Docket No. 19159, *Central of Georgia Railway Company Control*, — I.C.C. — decided November 14, 1958, I would approve the application for control in No. MC-F-6099, and discontinue the investigation in No. MC-F-6178.

COMMISSIONER GOFF dissents.

COMMISSIONERS MITCHELL, ARPAIA, AND WINCHELL, did not participate.

[fol. 30]

APPENDIX "B" TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 9th day of June, A. D. 1959.

No. MC-F-6099

THE L. NELSON & SONS TRANSPORTATION CO.—
CONTROL AND MERGER—GILBERTVILLE
TRUCKING CO., INC.

No. MC-F-6178

THE L. NELSON & SONS TRANSPORTATION CO.—
INVESTIGATION OF CONTROL—GILBERTVILLE
TRUCKING CO., INC.

Further investigation of the matters and things involved in these proceedings having been made, and the Commission, on the date hereof, having made and filed its report on reconsideration, which report, and the prior report of Division 4, dated February 26, 1958, are made a part hereof:

It is ordered. That the application in No. MC-F-6099 be, and it is hereby, denied.

It is further ordered. That, in No. MC-F-6178, respondents The L. Nelson & Sons Transportation Co., and Gilbertville Trucking Co., Inc., both corporations, and Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson, and Kenneth A. H. Nelson, individuals, and each of them, be, and they are hereby, required to terminate the violation of the provisions of section 5(4) of the Interstate Commerce Act, found in the said report to have been accomplished and to be continuing through the control or management of The L. Nelson & Sons Transportation Co. of Ellington, Conn., in a common interest with Gilbertville Trucking Co., Inc., of Gilbertville, Mass.

It is further ordered, That the said respondents be, and they are hereby, required to divest themselves of any and all interest which they may have in the capital stock of Gilbertville Trucking Co., Inc., provided, however, that in such divestment, none of the shares of stock shall be sold or transferred directly or indirectly to any stockholder, officer, director, employee, or agent of, or anyone otherwise directly or indirectly affiliated with or connected with or under the control or influence of The Nelson & Sons Transportation Co., or to any corporation in which it is financially interested or with which it is affiliated, or to any stockholder, officer, director, or employee of any such corporation, or its subsidiary or affiliated companies.

And it is further ordered, That The L. Nelson & Sons Transportation Co., and Gilbertville Trucking Co., Inc., both corporations, and Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson, and Kenneth A. H. Nelson, individuals, shall report to this Commission, within 60 days from the date hereof, the steps taken by each of them to [fol. 31] comply with the requirements of this order with respect to termination of the said violation of section 5(4) of the act.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(SEAL)

[fol. 32]

APPENDIX "C" TO COMPLAINT

[Stamp—Date of service Feb. 20, 1960]

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 15th day of February, A. D. 1960.

No. MC-F-6099

THE L. NELSON & SONS TRANSPORTATION CO.
CONTROL AND MERGER—GILBERTVILLE
TRUCKING CO., INC.

No. MC-F-6178

THE L. NELSON & SONS TRANSPORTATION CO.
INVESTIGATION OF CONTROL—GILBERTVILLE
TRUCKING CO., INC.

Upon consideration of the record in the above-entitled proceedings, and of the petition filed August 17, 1959, by The L. Nelson & Sons Transportation Co., and Gilbertville Trucking Co., Inc., seeking reopening and reconsideration, and approval of the application in No. MC-F-6099 and discontinuance of the investigation in No. MC-F-6178, or, alternatively, that the order of divestment be modified; and of the replies to the said petition:

It is ordered, That the petition be, and it is hereby, denied, for the reason that the material matters set forth in the petition have been considered by the Commission, that the findings to which the petition is directed are supported by the record, that the contention that the requirements of the Administrative Procedure Act have not been met is without merit, that no showing has been made that petitioners have been harmed by recall of the proceedings from Division 4 by the Commission, and that reconsideration is not warranted.

It is further ordered, That the order of June 9, 1959, be, and it is hereby, made effective 15 days from the date of service of this order.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(SEAL)

[fol. 33]

APPENDIX "D" TO COMPLAINT

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of July, A. D. 1960.

No. MC-F-6099

THE L. NELSON & SONS TRANSPORTATION CO.—
CONTROL AND MERGER—GILBERTVILLE
TRUCKING CO., INC.

No. MC-F-6178

THE L. NELSON & SONS TRANSPORTATION CO.—
INVESTIGATION OF CONTROL—GILBERTVILLE
TRUCKING CO., INC.

No. MC-42871 (Sub-No. 3)

THE L. NELSON & SONS
TRANSPORTATION COMPANY

Upon consideration of the record in the above-entitled proceedings in Nos. MC-F-6099 and MC-F-6178, of the petition of The L. Nelson & Sons Transportation Co., dated March 7, 1960, for cancellation of its outstanding certificate in No. MC-42871 (Sub-No. 3), and of the reply to such petition, dated March 23, 1960, filed by the Bureau of Inquiry and Compliance, Interstate Commerce Commission; and

It appearing, That the requested cancellation of petitioner's outstanding certificate in No. MC-42871 (Sub-No.

3), is predicated upon the concurrent vacation by this Commission of its orders of June 9, 1959 and February 15, 1960, entered in the proceedings in Nos. MC-F-6099 and MC-F-6178, which required, among other things, that petitioner and the persons in control thereof divest themselves of their interest in the capital stock of Gilbertville Trucking Co., Inc.:

It further appearing, That petitioner has shown no good cause for vacation of the aforesaid orders of June 9, 1959 and February 15, 1960, and that the violation of section 5(4) found in the report of June 9, 1959, is continuing:

It is ordered, That the petition be, and it is hereby, denied.

And it is further ordered, That the order of March 11, 1960, which stayed the effectiveness of the orders of June 9, 1959 and February 15, 1960, pending determination of the instant petition, be, and it is hereby, vacated, and that the effectiveness of the orders of June 9, 1959 and February 15, 1960, be, and they are hereby, reinstated, effective 15 days from the date hereof.

By the Commission.

HAROLD D. McCoy,
Secretary

(SEAL)

APPENDIX "F" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. MC-F-6099¹THE L. NELSON & SONS TRANSPORTATION CO.—
CONTROL AND MERGER—GILBERTVILLE
TRUCKING CO., INC.

Decided

- 1 In No. MC-F-6099, acquisition by The L. Nelson & Sons Transportation Co., of control of Gilbertville Trucking Co., Inc., through acquisition of its capital stock, and merger of its operating rights and property into the former for ownership, management, and operation; and acquisition by Charles G. Chilberg and Clifford J. O. Nelson of control of the operating rights and property through the control and merger, approved and authorized, subject to conditions.
- 2 In No. MC-F-6178, upon investigation, respondents found to have effectuated or participated in effectuating, and to be continuing, control and management of Gilbertville Trucking Co., Inc., and The L. Nelson & Sons Transportation Co. in a common interest in violation of section 5(4) of the Interstate Commerce Act. Investigation discontinued subject to condition.

Mary E. Kelley for applicants in No. MC-F-6099 and respondents in No. MC-F-6178.

Francis E. Barrett; Francis E. Barrett, Jr., Hugh M. Joseloff and Arthur J. Piken for protestants in No. MC-F-6099 and interested parties in No. MC-F-6178.

¹ This report embraces also No. MC-F-6178, The L. Nelson & Sons Transportation Co.—Investigation of Control—Gilbertville Trucking Co., Inc.

Robert G. Bleakney, Jr., William O. Keenan, James G. Lane, T. W. Marrett, and Kenneth B. Williams for interested parties in Nos. MC-F-6099 and MC-F-6178.

Ellis V. Gregory, Nell Guin and Herman F. Mueller for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

REPORT PROPOSED BY WALTER L. BAUMGARTNER, EXAMINER

The L. Nelson & Sons Transportation Co., a corporation of Ellington, Conn., and Gilbertville Trucking Co., Inc., of Gilbertville, Mass., herein called Nelson and Gilbertville, respectively, by joint application filed October 6, 1955, in No. MC-F-6099 seek authority under section 5 of the [fol. 35] Interstate Commerce Act, for (1) acquisition by the former of control of the latter through acquisition of its shares of stock by exchange, and (2) for the merger of the operating rights and property of the latter into the former for ownership, management, and operation. Charles G. Chilberg of Rockville, Conn., and Clifford J. O. Nelson of Dover, Mass., who are officers of, and control, Nelson through ownership in equal amounts of 91.50 percent of its capital stock, also seek authority under the same section to acquire concurrent control of the operating rights and property through the transaction.

By order entered December 20, 1955, in No. MC-F-6178, an investigation was instituted under section 5(7) of the Act, for the purpose of inquiring into and concerning the possibility that the control or management of Gilbertville in a common interest with Nelson may have been effectuated, and may be continuing, in violation of section 5(4) of the Act, and if such violations are found, of entering an order requiring the participants therein to take such action as may be necessary to prevent further such violations. Nelson, Gilbertville, Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson and Kenneth A. H. Nelson were named as respondents in the proceeding, herein sometimes referred to as the investigation or investigation proceeding. By the same order, the investigation proceeding and the application were assigned for concurrent hearing and

determination on a joint record. Since they are interrelated, they will be the subject of a single report.

[fol. 36] At the hearing thirteen motor common carriers of property² and the eastern territory railroads appeared and participated in opposition to the application and as interested parties in support of the investigation. The applicants-respondents, each of the motor carriers and the Commission's Bureau of Inquiry and Compliance introduced evidence. The railroads limited their participation in the hearing to the cross-examination of applicants' and respondents' witnesses.

The carrier applicants-respondents operate more than twenty motor vehicles.

They press on brief objections made at the hearing to various rulings of the examiner. Objection was made to his ruling on the order of presentation whereby applicants were required to go forward with the evidence in support of the application prior to the presentation of evidence in the investigation proceeding. It is their position that, since Nelson's fitness to acquire and exercise the Gilbertville operating rights is involved in both proceedings, they were entitled to hear the evidence against them in the investigation proceeding first so that they might be apprised of the evidence against them before having to meet it in the application proceeding. They also claim that, as a result of the ruling, erroneous rulings were made upon improper efforts during the cross-examination of applicants' witnesses to elicit testimony helpful to the investigation. The [fol. 37] examiner's ruling with respect to the order of presentation was in harmony with rule 1.74 of the Commission's General Rules of Practice prior to, and as amended, January 8, 1957, effective March 1, 1957, reading in pertinent part as follows:

² Adley Express Co., Alvin R. Holmes d/b/a Holmes Transportation Service and/or Jones Express, Downing & Perkins, H. T. Smith Express Co., Hemingway Bros. Trucking Co., Jackson Transportation Corp., Lombard Bros., Inc., M & M Transportation Company, National Transportation Co., Newbergh Transfer, Inc., P. B. Mutrie Motor Transportation, Inc., Taylor's Express Co., and Westchester Motor Lines, Inc., herein called Adley, Holmes, Downing, Smith, Hemingway, Jackson, Lombard, M & M, National, Newbergh, Mutrie, Taylor and Westchester, respectively.

" * * * In informal-complaint, application, and investigation proceedings, complainant, applicant, and respondent, respectively, shall open and close at the hearing. * * * The foregoing order of presentation may be varied by the (hearing) officer, who shall also designate the order of presentation in any other type of proceeding, of any other party to any proceeding, or of parties to several proceedings being heard upon a consolidated record."

The examiner's rulings upon objections made to questions and upon the admissibility of evidence during such cross-examination have been carefully examined and found proper. In any event, if erroneous in any respect, the rulings to that extent were harmless error. Since the investigation is not a criminal proceeding but civil in nature and conducted to enable the Commission to issue such corrective orders as may be necessary and appropriate to secure compliance with the Interstate Commerce Act, and since the investigation involved matters bearing upon the fitness of the applicant Nelson, an issue upon which applicants have the burden of proof and upon which opposing carriers have the right to submit evidence in rebuttal, in the application proceeding, and since applicants-respondents have failed to establish that they were in any way prejudiced by the ruling on the order of presentation, there is no basis for a finding that the examiner abused his discretion therein and the Commission should overrule the objections thereto.

Applicants-respondents also assert error in various rulings upon their objections to questions propounded by the Bureau of Inquiry and Compliance to two witnesses produced by it upon the ground that the questions called for hearsay statements. The two witnesses were employees [fol. 38] of the Commission who, during the course of an investigation of the operations of Gilbertville and Nelson, were given certain information with respect thereto in response to oral inquiries, by a Gilbertville director and terminal manager and by Kenneth Nelson, president of Gilbertville, and by Clifford Nelson and Charles Chilberg, secretary and president, respectively, of Nelson. All of these gentlemen were actively engaged in the performance

of managerial functions, of one or both of the carriers. Over objection, one of the witnesses was permitted to testify to statements made to him by the terminal manager as to his connections with Gilbertville his previous employment by Nelson, his receipt from Kenneth of 24 shares of Gilbertville stock, the practices followed by the two carriers in effecting through movements of shipments under equipment leases between them and the repair of Gilbertville equipment in Nelson's shop at Ellington. The facts respecting the declarant's relationship and connection with the two carriers were already of record through other evidence. The equipment leasing and repair practices were matters within the scope of his employment concerning which, as an agent, he could speak with authority and binding effect upon his employer, a party to both proceedings here. His statements were admissions against interest or voluntary acknowledgements made by Gilbertville through its agent within the scope of his employment. 31 C. J. S., paragraphs 270, 271, and 272, pp. 1622-1024; *Pan American Petroleum & T. Co. v. U. S.* (1927), 273 U. S. 456, 499; *Takahashi v. Hecht Co.* (1931), 50 F. 2d 326, 328. The repetition on the witness stand of information elicited by the witnesses from Kenneth and Clifford Nelson and Charles Chilberg was clearly admissible hearsay since it disclosed admissions [fol. 39] against interest by parties to the proceedings who were also officers and agents of the corporate parties, 31 C. J. S., paragraph 354, p. 1128; *Pan American Petroleum & T. Co. v. U. S.*, *supra*.

Error is also claimed in the examiner's rulings preventing testimony of the same two witnesses as to the provisions of Commission regulations and the law applicable to acts of the respondents alleged to be unlawful. The testimony of a witness as to what the domestic as distinguished from foreign law is wholly incompetent. The courts, and, hence, the Commission must take judicial and official notice of Federal statutes and agency regulations. The sources are open to the courts and the Commission and it is their duty to hear the evidence and determine for themselves the law applicable thereto. *U. S. v. Hoblitzel* (1932), 2 F. Supp. 832, 836; *W. U. Tel. Co. v. White* (Tex. 1914), 162 S. W.

905, 909; *Owens v. National Hatchet Co.* (Iowa 1909), 121 N. W. 1076, 1079; 44 U. S. C. 307; Rule 1.75, General Rules of Practice.

On November 12, 1954, one of the witnesses referred to above, while visiting Gilbertville's terminal at Newton, Mass., in the pursuance of his duties, discovered and made a copy of a teletype message made and received at the terminal. It was received in evidence as an exhibit after an explanation of its source and of its contents by the witness. It related to the handling of Gilbertville freight and the use of its vehicles. Objection was made both to its reception in evidence and to the witness's explanation of its contents on the ground that its contents were not clear, etc. A portion of its text will be set out later in this report. [fol. 40] Suffice it to say at this point that an analysis of it makes its meaning clear and establishes its relevancy. The objection made goes to its weight rather than its admissibility or competence.

Error by the examiner is also claimed by a ruling excluding the testimony of an accountant, called as a witness by applicants, with respect to Gilbertville's operating revenues for periods prior to Kenneth Nelson's purchase of it. Objection was sustained on the ground that the accountant not having compiled the figures and not having checked them against the underlying data from which they were taken was not qualified to testify as to their accuracy and significance particularly on cross-examination. On brief, applicants-respondents rely upon rule 1.79 of the General Rules of Practice which embodies in part the "shop-book" rule of evidence relating to the admissibility of any writing or record made as a memorandum or record of any transaction if made in regular course of business at the time of the transaction or shortly thereafter, etc. As no proper foundation had been laid to render the testimony admissible, the ruling was clearly correct, and if not, it was harmless error, since the relevance or materiality of the testimony sought is not apparent and was not shown.

Two motions were filed by applicants-respondents requesting that parts of two briefs filed by motor carriers opposing the merger be stricken. The Commission is re-

quested to strike two parts of the brief filed in behalf of Mutrie, Holmes, Newburgh and Taylor, each of which is asserted to contain "libelous" statements with reference to applicants-respondents wholly lacking in evidentiary support. In answer, counsel for Mutrie et al. request that the Commission strike from the brief any comment which it feels is in the slightest degree improper or in contravention [fol. 41] of any rule of the Commission. Rule 1.4(d) of the General Rules of Practice provides that the Commission may order any redundant, immaterial, impertinent or scandalous matter stricken from any pleading, document or paper filed with it. The portions of the brief under criticism contain arguments made in good faith and evolved in the author's consideration of matters in evidence. Not all may agree that his reasoning or deductions are sound, but they appear to be permissible and plausible. The slight amount of intemperate language may be ascribed to over-zealousness in argument which usually does not generate conviction and sometimes defeats its own purpose. The motion to strike should be denied.

The second motion is directed to the brief filed in behalf of Adley, M & M, and Hemingway and requests the striking of three portions thereof. The first two are challenged as efforts to import into the record or to draw attention to matters not of record. Since such matters have in no way been shown to be relevant or material to the issues here, they will be disregarded even though not stricken. The third portion sought to be stricken appears to be legitimate argument based upon facts in evidence. Much of the considerations urged in support of the motion appears to be in the nature of a reply to the brief and may not be weighed since reply briefs were not contemplated here. The motion should be denied.

BACKGROUND AND CORPORATE ORGANIZATIONS

Mrs. Linnea Nelson, married twice, was the mother of seven children, viz., Charles C., Oscar H., and Howard Chilberg, Kenneth A. H. and Clifford J. O. Nelson, Greta C. Nelson Carlson and Ruth Nelson Widham Nyberg, Mrs. Nelson, in partnership with two of her sons, Charles and

[fol. 42] Oscar Chilberg, inaugurated the Nelson transportation business in 1930. The L. Nelson & Sons Transportation Co. was incorporated under the laws of Connecticut on February 7, 1948. Of the 500 shares authorized, all common, 496 were issued to her and one share each to four of her sons, viz., Charles and Oscar Chilberg and Clifford and Kenneth Nelson. On May 14, 1948, she transferred 49 of her shares to each of those sons, thus increasing their holdings to 50 shares each, and reducing hers to 300 shares. In January 1949, she was president and treasurer, Oscar vice-president, Kenneth assistant treasurer, and Clifford secretary. On January 5, 1950, Mrs. Nelson died, testate, devising 42 shares of her stock to each of her seven children (total 294). The other six shares were purchased from the estate by Nelson and held as treasury stock. During the administration of her estate, her 300 shares were voted under proxy by Charles, who was one of the three executors.

On June 30, 1951, Oscar sold his 50 shares to Charles and resigned as an officer and director of the corporation. On September 22, 1951, Kenneth sold his 50 shares to Clifford and likewise resigned as an officer and director. Neither has since been an officer or director of the company. Howard, who was employed as office manager, severed his employment in 1951.

Stock distribution from Mrs. Nelson's estate was made on January 24, 1953, at which time Kenneth transferred his 42 shares to Clifford in accordance with his agreement to sell made September 22, 1951. Oscar sold his 42 shares to Charles. Shortly thereafter Howard Chilberg and Ruth Nelson Nyberg sold their respective shares in equal amounts to Charles and Clifford. Hence, ever since then, Charles and [fol. 43] Clifford have each held 226 shares and Greta Nelson Carlson 42 shares. Charles is now president, treasurer and a director, Clifford secretary, assistant treasurer and a director and Greta Carlson a director.

R. A. Byrnes, Incorporated, formerly of Mullica Hill, N. J., is a motor common and contract carrier controlled through stock ownership by Charles Chilberg and Clifford Nelson pursuant to authority granted by the Commission on August 21, 1956, in MC-F-5749. Its books and records are kept at, and its operations are directed from, the Elling-

ton-Rockville, Conn., terminal where Nelson and Gilbertville are headquartered.

Gilbertville is a Massachusetts corporation organized June 26, 1940, with an authorized capital of 100 shares of no-par common stock. For corporate purposes, its principal place of business is registered as Gilbertville, Mass. In January, 1953, all of the stock was owned by Wilfred Yachon. At that time, Kenneth began negotiations for, and sought the advice of his accountant and financial adviser with respect to, their purchase. By a contract, dated March 2, 1953, Kenneth agreed to buy the stock for \$35,000, out of which were paid in accordance with the contract, all liabilities of the corporation in excess of its good current assets. Yachon realized a net of \$22,447, of which \$12,447 was paid him in cash and \$10,000 by a promissory note signed by Kenneth Nelson and Oscar Chilberg. The note was payable at the rate of \$500 per quarter, interest at 4%, and secured by an escrow of the stock purchased. To assist in financing the transaction, \$30,000 was borrowed from a bank upon a promissory note signed by Kenneth and Oscar. Of the amount so borrowed, \$5,000 was advanced to Gilbertville by Kenneth for working capital. The \$10,000 note to Yachon was paid off within a year by checks drawn on [fol. 44] Gilbertville, signed by Kenneth. The \$30,000 borrowed from the bank had not been repaid as of the time of the hearing. The 100 shares were transferred to Kenneth who in turn transferred one qualifying share to his attorney and 48 to Oscar. Kenneth became president, Oscar treasurer, and the attorney, clerk. All became directors. In March of 1954, Oscar caused transfer of his 48 shares to Kenneth who then transferred 24 to his wife and 24 to John Kashady, Gilbertville terminal manager at Gilbertville, to enhance his prestige. Oscar resigned as treasurer and director, Kenneth became treasurer in addition to his presidency and the four stockholders became directors. Neither Kenneth's wife nor Oscar nor Kashady paid anything for the stock transferred to them. Oscar was not a party to the purchase contract, never took an active part in the affairs of the corporation, invested no money therein and received no salary or other compensation from it. Kenneth

testified, in effect, that he is the beneficial owner of the stock and can deliver it to Nelson if the merger is approved.

The Bergson Company, herein called Bergson, an outgrowth of the estate of Linnea Nelson, is a real estate holding company organized in January, 1953. Each of her children holds 70 of the 490 outstanding shares of the company. Oscar is president, Charles is vice-president and treasurer, and Clifford is secretary. All of the children serve as directors and receive \$360 per year each as salary. No dividends are paid. Certain of its properties, approximately two-thirds in value and 10 percent in area, are leased to Nelson and used by it and, under sublease, by Gilbertville as will be more particularly noted later.

[fol. 45]

OPERATING AUTHORITIES INVOLVED IN MERGER

On April 27, 1955, in No. MC 42871, Sub. 3, a certificate was issued to Nelson authorizing operation in interstate or foreign commerce as a motor common carrier of (a) materials used in the manufacture of cloth, waste materials resulting therefrom, and supplies and materials used in connection with transportation or processing of such commodities, when moving to or from places of processing, except liquid commodities, in bulk, in tank vehicles, over irregular routes, (1) between Hudson, North Chelmsford, Norton, Lowell, Lawrence and Marlboro, Mass., on one hand, and, on the other, Manchester, Concord, and Somersworth, N. H., and points in Providence and Bristol Counties, R. I.; (2) between Providence, Woonsocket and Pawtucket, R. I., Hartford, Hazardville and Somersville, Conn., and points in Massachusetts east of the Connecticut River, on the one hand, and on the other, New York, N. Y., Jersey City, Passaic, Newark and Camden, N. J., Philadelphia, Pa., and points in Pennsylvania within 30 miles of Philadelphia; (3) between Hazardville, on the one hand, and, on the other, Millbury and East Douglas, Mass.; (4) from Philadelphia and Camden to points in Tolland and Hartford Counties, Conn., on and north of U. S. Highway 6; and (b) empty containers used in transporting the commodities named above, over irregular routes from the said points in

Tolland and Hartford Counties to Philadelphia and Camden. Nelson also holds intrastate general commodity irregular route authority in Connecticut and Massachusetts.

On April 1, 1941, in No. MC-60186, a certificate was issued to Byrnes authorizing operation in interstate or foreign commerce as a motor common carrier over irregular [fol. 46] routes (a) of general commodities, except explosives, poles, canned foods and commodities used in canning or processing food, (1) between New York City, on the one hand, and, on the other, Philadelphia and points in Pennsylvania within 25 miles thereof and those in New Jersey; (2) from points in New Jersey to Philadelphia and points within 25 miles thereof; (3) from New York City and points in New Jersey to those in portions of Delaware, Maryland and Virginia and all of the District of Columbia; (b) of fertilizer from Baltimore, Md., and Philadelphia to points in New Jersey; (c) of oil in containers from Claymont, Del., to Camden; (d) of produce, except that used in processing food, from Gloucester, Salem and Cumberland Counties, N. J., to the District of Columbia and to certain portions of Pennsylvania and New York. On April 25, 1941, in No. MC-93421, a permit was issued to Byrnes authorizing operation in interstate or foreign commerce as a contract carrier over irregular routes, (a) of commodities used in canning or processing food from New York City, Philadelphia and Baltimore to Swedesboro, N. J.; and (b) of canned goods from Swedesboro to Massachusetts, Rhode Island, Connecticut, Delaware, Maryland and the District of Columbia, Virginia within 25 miles of the District, and portions of Pennsylvania and New York. Upon Byrnes application in No. MC-93421 Sub-1, the Commission by a report, dated August 16, 1956, ordered, among other things, [fol. 47] the enlargement of the operating authority above described to include "canned goods from Philadelphia to Swedesboro" and found that the holding by Byrnes of a permit containing the operating authority as so enlarged concurrently with the holding by Nelson of the certificate in No. MC-42871 will be consistent with the public interest. *R. A. Burnes, Inc.—Ext.—Canned Goods*, 68 M.C.C. 57.

On February 25, 1955, in No. MC-87431, a consolidated certificate was issued to Gilbertville authorizing operation

in interstate or foreign commerce as a common carrier of (a) general commodities, with the usual exceptions, over 17 described regular routes between Lowell, Mass., and Boston, Mass., serving 31 intermediate, and 5 off-route, points in Massachusetts, (b) the same commodities over irregular routes between points in Massachusetts, (c) the same commodities over irregular routes (1) between the Town of Hardwick, Mass., on the one hand, and, on the other, New York City and points in New York and New Jersey within 20 miles of New York City, (2) between Palmer, Mass., and points in Massachusetts within 10 miles of Palmer, on the one hand, and, on the other, points in Connecticut and Rhode Island, (3) between Palmer and Monson, Mass., on the one hand, and, on the other, points in Massachusetts within 5 miles of Palmer and Monson, (d) of sanitary napkins, facial tissues, and paper boxes over regular routes between New York City and Wilmington, Del., serving Philadelphia and [fol. 48] the off-route point of Rockland, Del., and (e) of sanitary napkins, facial tissues, and machinery, over irregular routes, from Hardwick, Mass., to Boston, New York City and points in New York and New Jersey within 20 miles of New York City, (f) materials used or useful in the manufacture and sale of sanitary napkins and facial tissues, in the reverse direction, (g) pickled skins from New York City to Ipswich and Peabody, Mass.; (h) pulpboard from Boston to Hardwick, (i) fertilizer and fertilizer materials from Portland, Conn., to Hardwick and points in Massachusetts within 15 miles of Hardwick, (j) lime and limestone products from Adams and Lee, Mass., to Hamden, East Hartford, and Hartford, Conn., Providence and Woonsocket, R. I., New York City and points in New Jersey within 10 miles of New York City, (k) agricultural commodities from Hardwick to Melrose, Conn., and New York City, (l) household goods between Palmer and points in Massachusetts within 10 miles of Palmer, on the one hand, and, on the other, points in Vermont, and between Hardwick and points in Connecticut, New Jersey, New York and Rhode Island; and (m) livestock between Palmer and points in Massachusetts within ten miles thereof, on the one hand, and, on the other, points in Vermont. The operating authority described in (a) and (b) above

[fol. 49] was transferred to Gilbertville for \$7,500 cash pursuant to a purchase agreement by Lewis R. Marmer on August 12, 1954, under approval given in No. MC-FC-57090.

THE MERGER AGREEMENT

Under the terms of the agreement dated August 18, 1955, between Kenneth Nelson and Gilbertville on the one hand and Nelson on the other, reciting a mutual desire to merge the respective motor transportation businesses of the two carriers, Kenneth would within 60 days after the effective date of the final order of the Commission approving the transaction, transfer to Nelson all of the shares of Gilbertville stock in full consideration for which Nelson would transfer to Kenneth as many shares of Nelson stock as may be due him based on the then net book value of the respective corporations after provision for Federal and State corporation taxes as of the date of the transfer. It was recognized and acknowledged in the agreement that upon that basis, if consummation had been effected on May 31, 1955, the relationship of the net book values were such that Kenneth would have received 85 shares of Nelson stock for his 100 shares of Gilbertville stock. An exhibit in evidence shows that if consummation had taken place on [fol. 50] July 31, 1956, Kenneth would have received only 78 shares of Nelson stock. It was further agreed that as soon after approval of the transaction by the Commission as practical Nelson would seek authorization from the proper authorities to increase its capital stock by an amount necessary to carry out the agreement. Each corporation agreed to an audit of its books by the other to enable computation of the respective book values of their shares. It was further agreed that any party to the agreement whose rights would be diminished or obligations increased by compliance with any condition or limitation which the Commission might attach to its approval of the transaction may terminate the agreement upon proper written notice to the other party within 10 days after receipt of the final order of the Commission. Gilbertville agreed to cooperate in the preparation and filing of the "application for merger

of the properties of Gilbertville and Nelson." While the agreement contains no provision for the assumption by Nelson of Gilbertville's liabilities, it was represented at the hearing and is the understanding of the parties that it is to do so.

FACILITIES AND OPERATIONS

As of July 31, 1956, Nelson owned and operated 14 trucks, 61 tractors, and 83 trailers. On the rare occasions when it may be necessary to augment its fleet, it leases equipment from Gilbertville. Nelson has 110 employees: [fol. 51] 10 office employees, 5 terminal managers, 5 dispatchers, 6 mechanics, 3 utility men, 2 salesmen and 79 drivers. It maintains five terminals: one each at Rockville-Ellington, Conn., Newton, Mass., Woonsocket, R. I., Long Island City (which is within New York City), and Philadelphia. All of the terminals, except that at Long Island City, are leased from Bergson at a total monthly rental of \$675 or \$8,100 per year. Occupancy of the Long Island terminal is shared, without assignment of specific space, with Smith & Jordan a motor carrier from which Nelson rents space, Gilbertville and Byrnes. The premises at Rockville-Ellington consists of a yard, a two-story building the first floor of which is occupied by Nelson and Byrnes as headquarters and the second floor of which is occupied by Gilbertville for similar purposes, and another building in the rear used as a terminal. Nelson maintains a garage and repair shop on the premises where five mechanics are employed. It employs a dispatcher at each terminal, with instructions to dispatch only its equipment and drivers. It leases, and shares with Gilbertville and Byrnes the use of, telephone lines connecting all of the terminals and Bridgeport, N. J.

Under temporary authority from the Commission, Charles Chilberg and Clifford Nelson assumed control of Byrnes on August 12, 1954, and have been operating it since then.

Nelson renders overnight service between its New England points and those in the areas in New York, New Jersey and Pennsylvania it is authorized to serve. Over 75 percent of its total traffic is interstate and 70 to 75 percent

is truckload. About 8 percent in dollar volume is inter-
[fol. 52] lined with Gilbertville and 15 to 20 other carriers,
of which approximately 6 operate in the same area as
Gilbertville. Only 2 to 3 percent is interlined with Gilbert-
ville.

The operations of the latter are chiefly irregular route
in the performance of call-on-demand overnight service.
Its interstate traffic preponderates. It endeavors to observe
its Hardwick and Palmer gateways in accordance with its
operating authority. About 70 to 75 percent of its operat-
ing revenues are derived from business local to its lines
and about 25 to 30 percent from interline traffic. Interline
is made with approximately 50 motor carriers, including
Nelson and Byrnes. Divisions of revenues with carriers
with which interchanges are frequent is upon a fixed per-
centage basis regardless of the length of the hauls as be-
tween the respective carriers. Thus the division with
Nelson is 60 percent to Nelson and 40 percent to Gilbert-
ville. With respect to some other carriers, the division is
upon a mileage prorate basis.

When Kenneth took over in March 1953, Gilbertville had
one truck, three tractors and four trailers. As of July 31,
1956, it had 15 trucks, 12 tractors and 8 trailers with a
depreciated ledger value of \$106,828. Except as to four
used tractors purchased from Nelson in October, 1954, for
\$200 each (depreciated on Nelson's books to \$100 each) all
additions to equipment were new units. Gilbertville aug-
ments its fleet almost daily by leasing equipment in vary-
ing amounts from Nelson. It has a terminal at Gilbertville,
Mass., and, in conjunction with Nelson, one each at
Rockville-Ellington, Newton, Woonsocket and New York
City, at each of which it provides collection-and-delivery
service on less-than-truckload shipments. About three
units per day are used in over-the-road operation between
New York City and Massachusetts points. At each termi-
[fol. 53] nal, except Rockville-Ellington, it employs a ter-
minal manager, and at Rockville-Ellington and New York
City, dispatchers. In all, it employs 71 persons: 53 drivers,
4 terminal managers, 3 dispatchers and 10 office employees.
Its principal bookkeeping and transportation records are
kept at the Rockville-Ellington headquarters.

INTERRELATIONS OF THE APPLICANTS

Although Kenneth Nelson disposed of his stock in, and resigned as an officer of Nelson in September, 1951, he continued to have an office on Nelson's premises at Rockville-Ellington. As a "free lance" tariff consultant, he rendered bills to, and was paid periodically by, Nelson in the total amounts of \$15,650 in 1952, and \$13,829 in 1953. From March of 1953, he was in control of and operated Gilbertville. For that year, its administrative and general expense amounted only to \$4,389. For 1954, such expense jumped to \$34,027 and for 1955, to \$40,124. On their visit to Nelson's office at Rockville-Ellington in November, 1954, two employees of the Commission engaged in investigation observed Kenneth engaged in activities believed to be in furtherance of Nelson's business. Among other things, they noticed him at a desk answering telephone calls, issuing orders over an intercommunication system, and operating a teletype machine. At that time Nelson's terminals were equipped with intercommunicating teletype machines. Kenneth tore two to three yards of the teletype tape covered with messages of the machine and folded it. About 20 to 30 minutes later, one of the Commission's men requested production of the tape for inspection and was told by Kenneth that he had destroyed it. Another such request made after exhibiting to him a copy of Commission regulations requiring preservation of carrier teletype messages for three years, elicited the same response. Upon inquiry addressed that day to Clifford Nelson, he offered no explanation of Kenneth's activities in the Nelson office. Some time during the ensuing year, interterminal telephone lines had been substituted for the teletype service because, Kenneth explained, the latter was found to be very slow and required the use of a skilled operator.

John Kashady, Gilbertville's director and terminal manager at Gilbertville, Mass., had been employed by Nelson for 15 years prior to his connection with Gilbertville.

On November 12, 1954, one of the Commission's employees found at the Newton terminal occupied jointly with Nelson, a record of teletype messages transmitted apparently by Clifford Nelson from Rockville-Ellington giving

instructions to some one at the Newton terminal. In substance, they and the answers were as follows:

Oh, don't tell me a truck is going to come home empty. Over. Not at all, will have enough freight and could have more. Over. OK, make sure that any Gilbertville freight is in sealed envelopes and driver doesn't know he has it. That goes for Woonsocket. I will tell him also. How about Friday. Over. ***** OK. Make sure you send the mats on as the truck will be there first shot. Also put on a Gilbertville bill. And a lease too. No. Certainly not. It is only 4 bales. That isn't all the truck has, is it? No. OK. I said to put the pro in a sealed envelope. You can only use a lease when the whole thing is. Yes, I get it. I made out a lease for the oil load and had Rose with a tractor already leased with signs.

The signs presumably referred to the placards required on leased vehicles by Commission regulations to show ownership and leasee.

On November 8, 1955, the Commission employee again visited the Newton terminal and there observed a Nelson truck under lease to Gilbertville. The load included 14 bales of silk for which there were no shipping papers. Clifford Nelson being present, this was called to his attention, whereupon he called New York and thereafter a Gilbertville freight bill covering the silk was prepared.

[fol. 55] Terminal and office facilities at Rockville-Ellington, Woonsocket and Newton, owned by Bergson, are jointly used by Nelson and Gilbertville; the former as primary lessee and the latter as a sublessee of the former. For these three and the terminal at Philadelphia, occupied only by Nelson, it pays Bergson total rentals of \$8,100 annually. The terminal space at New York, rented by Nelson from another carrier, is also jointly used by Nelson, Gilbertville and Byrnes. Monthly rentals paid are as follows:

	Since 1-1-1956		Prior to 1-1-1956	
	Nelson to landlord	Gilbert- ville to Nelson	Nelson to Bergson	Gilbert- ville to Nelson
Long Island City	\$500	\$250		Same
Rockville-Ellington	\$275	\$100	\$275	\$50
Woonsocket, incl. use of telephone	100	100	100	25
Newton, incl. use of telephone	100	100	100	25

At Long Island City, Woonsocket, Newton, Philadelphia, Boston, Lowell, and Worcester, Nelson and Gilbertville have the same telephone numbers. The total costs of the leased interterminal telephone lines and the listings at the various terminals are approximately \$1,100 per month, paid by Nelson and \$400 of which is reimbursed to it by Gilbertville. At Rockville-Ellington, the same premises are occupied by Nelson, Gilbertville and Byrnes as headquarters and a terminal.

In October, 1954, Nelson sold to Gilbertville four tractors at \$200 each which had already been depreciated on Nelson's books to a salvage value of \$100 each. At another time, Nelson sold to Gilbertville two trucks.

Gilbertville's fleet is continually augmented by vehicles leased from Nelson. It usually has about three trucks and two to three tractors on term leases (30 days or more) from [fol. 56] Nelson; and, in addition, it usually leases from Nelson on a trip-lease basis from one to six complete units (tractors and trailers) and a couple of trailers each day. On rare occasions, Nelson leases vehicles from Gilbertville.

At the Gilbertville and Rockville-Ellington terminals, Gilbertville keeps lists of Nelson-owned vehicles described by type, registration, vehicle, and serial number and make to facilitate leasing. These lists and a pile of executed leases covering complete tractor-trailer units were observed by a Commission employee engaged in investigation. For convenience, printed form leases and vehicle inspection reports are used. On November 8, 1955, literally hundreds

of executed leases were available for inspections by another Commission employee.

The terminal manager at Gilbertville explained to the Commission employee that usually when either company handled a shipment destined for a point on the lines of the other, a vehicle was leased by the destination carrier from the other and the same driver was employed, thus enabling performance of an uninterrupted through movement.

On November 8, 1955, Gilbertville owed Nelson approximately \$19,000 in equipment rentals. For the period, January 1, to July 31, 1956, such rentals amounted to \$7,065.03. During an investigation at the Rockville-Ellington terminal, the Commission employees found that Gilbertville had on hand a complete file of doctor's certificate for all of Nelson's drivers, that in numerous instances the same driver was employed by both during the same payroll period, and that the drivers of both were using the same time-recording [fol. 57] clock. They also observed a posted seniority list of Nelson drivers upon which appeared the names of five or six Gilbertville drivers. Names of Nelson drivers were found in Gilbertville records. At that time, Kenneth admitted that the same driver might be employed by both companies during the same payroll period and even during the same day; that the duplication of drivers' medical certificates in the files of both companies was an industry practice and precautionary measure to insure compliance with the Commission's safety regulations.

At least 25 percent of the repairs on Gilbertville's vehicles are made by Nelson at Rockville-Ellington. Nelson pays its mechanics two dollars an hour, it charges Gilbertville three dollars an hour, and, for parts, cost plus 10 percent. The monthly cost of such repairs range from \$300 to \$400. Gilbertville maintains a mechanic at New York City. It also buys oil and motor fuel from Nelson at Newton.

It interchanges freight with many carriers; about 5 percent in terms of its total revenue, with Nelson, and another 4 to 5 percent with Byrnes. Points of interchange with Nelson are Manson, Gilbertville which is in the Town of Harwick, and Rockville-Ellington. Its division of interline revenues with Nelson is a constant 40 percent regardless of length of respective hauls. The evidence shows that divi-

shions between carriers are customarily computed on a mileage prorate basis and sometimes on a fixed percentage basis. At Rockville-Ellington, it was learned that Nelson did all of the billing on shipments interlined with Gilbertville, regardless of whether prepaid or collect and regardless of which carrier made delivery. On November 8, 1955, Nelson owed Gilbertville over \$39,000 for interline settlements. Since, as Kenneth testified, only about 5 percent of Gilbertville's operating revenues, which for the years 1953 through 1955 were \$616,544, the size of the indebtedness indicates an accumulation during the whole of the three years.

At various times and places, commission employees in the performance of their duties observed some seven or eight instances of the movement of the shipments of one carrier by the other. Thus, it may be reasonably inferred that they engaged in the practice of commingling or pooling their shipments to suit their convenience.

FINANCIAL DATA

Balance sheets of Nelson and Gilbertville show:

<i>Nelson</i>		
ASSETS	As of 7/31/56	As of 12/31/55
Cash	\$ 5,572	\$ 13,313
Notes receivable	3,792	3,820
Accounts receivable, less reserve for uncollectibles	70,815	86,475
Prepayments	27,095	18,594
Materials and supplies	9,549	8,942
Total current assets	116,763	127,324
Tangible property (operating) net	444,650	294,295
Intangible property	0	0
TOTAL ASSETS	\$561,413	\$421,619

LIABILITIES	As of 7/31/56	As of 12/31/55
Notes payable	\$ 13,563	\$ 20,000
Accounts payable	42,762	55,159
Wages payable	12,275	9,362
Accrued taxes	11,303	15,425
Total current liabilities	79,903	99,946
Advances payable (notes payable officers and not within 1 year)	46,527	16,298
Equipment obligations	269,955	152,806
Reserves (injuries, loss and damage, income taxes)	7,585	11,102
Total liabilities	403,970	280,152
Capital stock	49,400	49,400
Surplus (including net profit, less taxes)	108,043	92,067
TOTAL LIABILITIES AND CAPITAL	\$561,413	\$421,619

[fol. 59]

Gilbertville
(As adjusted at hearing)

ASSETS	As of 7/31/56	As of 12/31/55
Cash in banks	\$(4,508)	\$ 10,068
Accounts receivable, less reserve for uncollectibles	55,663	48,084
Prepayments	6,169	2,384
Materials and supplies	0	0
Total current assets	57,324	60,536
Tangible property (operating) net	112,376	75,116
Land	4,175	
Intangible property		
Organization	150	150
Franchises, less reserve for amortization	5,750	6,625
TOTAL ASSETS	\$179,775	\$142,427

LIABILITIES	As of 7-31-56	As of 12-31-55
Accounts payable	\$ 32,513	\$ 50,622
Wages payable	14,334	5,575
Taxes accrued	11,335	9,681
Equipment obligations due within 1 year	38,399	18,207
Total current liabilities	95,581	84,085
Notes payable officers	20,095	19,597
Equipment obligations	34,423	14,764
Reserves (injuries, loss and damage, income taxes)	5,088	5,510
Total liabilities	\$155,187	\$123,956
Capital stock	100	100
Surplus (including net profit, less taxes)	24,488	18,371
TOTAL LIABILITIES AND CAPITAL	\$179,775	\$142,427

Operating statements of the two carriers show the following revenues and net incomes:

Nelson

	Operating revenues	Net Income or Loss Before Income Taxes	After Income Taxes
1953	\$895,774	\$27,678	\$19,982
1954	889,420	8,206	2,637
1955	924,607	17,809	12,116
1956 to August 1	630,607	18,600	15,976

Gilbertville

1953	\$ 75,489	\$22,839	\$20,314
1954	117,818	(1,158)	(2,499)
1955	423,237	4,573	2,035
1956 to August 1)	444,777	9,588	6,117

[fol. 60] It is noted that for the year 1953, Gilbertville's operating revenues were \$75,489, its administrative and

general expense \$4,389, and net income \$20,314, whereas for the year 1954 its operating revenues climbed to \$117,818, its administrative and general expense to \$34,027, and its net income fell to a loss of \$2,499.

The "giving effect" balance sheet as of July 31, 1956, reflects the increase in Nelson's corporate shares from 500 to the 578 that would have been issued to Kenneth Nelson if consummation of the transaction had been effected on that date, calculated according to the formula contained in the contract of August 18, 1955. It also shows that as of that date, the combined current assets of the two companies were \$174,087 against combined current liabilities of \$175,484, after an adjustment at the hearing to include \$38,399 in equipment obligations due within one year.

Consummation of the transaction will require no new borrowing and it is anticipated that Nelson will have no difficulty in financing it in view of the projected combined net incomes and the increase expected therein through operating economies. Applicants indicated at the hearing that Nelson has no objection to the immediate writeoff of the amount assigned to its "Other Intangible Property" account as a result of the transaction, and, if approval is granted, it will be conditioned accordingly.

A "giving effect" operating statement for the first seven months of 1956 submitted by applicants shows anticipated savings approximating \$37,184 from various economies to result from unification of operations, thus increasing combined net operating revenues to \$77,566 for the unified [fol. 61] operation with an operating ratio of 92.8 percent as compared with an operating ratio of 96.2 percent calculated upon the bare sum of the revenues from separate operations. The estimates of many of the items of expected savings are challenged by the rail carriers because applicants' witnesses were unable to provide sound or credible bases therefor, and because it is argued many of the economies have already been effected by operations under common control.

If the transaction is consummated, some employees will be reassigned to reduce over-time wages; an additional employee will be assigned to safety work and another to claims

supervision. All employees of both companies are to be retained. However, there will eventually be a reduction in the office staff of three employees by attrition. An additional terminal may be established at Springfield, Mass., on land recently acquired by Gilbertville for terminal purposes, in part to eliminate considerable back-haul operation in the observance of gateways. The applicants do not believe that the merged operations will enjoy any substantial increase in freight tonnage beyond that handled by the two companies. The merger, they claim will benefit the public by producing one financially sound company able to provide a better service.

PROTESTANT AND OPPOSING MOTOR CARRIER PARTIES

The motor carriers protesting and opposing the application are common carriers, each operating under one or more certificates issued by the Commission. The evidence in behalf of ten of them, viz., Alvin B. Holmes, doing business as Holmes Transportation Service and/or Jones Express, Worcester, Mass., Newburgh Transfer, Inc., Newburgh, N. Y., Taylor's Express Co., Haverhill, Mass., P. B. Mutrie Motor Transportation, Inc., Waltham, Mass., H. T. Smith Express Co., Inc., Wallingford, Conn., National Transportation Company, Bridgeport, Conn., Lombard Bros., Inc., Waterbury, Conn., Downing & Perkins, Inc., Newington, Conn., Westchester Motor Lines, Inc., Tuckahoe, N. Y., and Jackson Transportation Corporation, New York, N. Y., was submitted by means of substantially similar stipulations and exhibits setting forth operating authorities, equipment operated, certain operating statistics, and locations of terminals. Each avers that it performs service throughout the territory covered by its operating authority. Each opposes the application because it believes that Gilbertville's operating authority is dormant, in part; that new competition would result from the proposed merger; and that granting the application would have an adverse effect upon it.

Holmes is authorized to transport general commodities with exceptions, over regular routes between specified

points in Massachusetts, on the one hand, and, on the other, specified points in New Hampshire, Vermont, Rhode Island, and Connecticut, and between certain points in such States other than Massachusetts; and general and specified commodities between points in Massachusetts, Rhode Island, Connecticut, and that part of New York and New Jersey within 20 miles of New York City. It maintains terminals at ten points in the States mentioned, except New York and Vermont; and operates 68 trucks, 51 tractors, and 101 trailers. Its operating revenues and ratios³ are as follows: For 1954, \$1,888,921, ratio 99.11; for 1955, \$2,054,860, ratio [fol. 63] 98.05; and for 24 weeks ending June 16, 1956, \$1,072,543, ratio 99.96.

Newburgh Transfer, Inc., controlled by Holmes under temporary authority, claims authority so far as here material, to transport general commodities, with exceptions, over regular routes between New York City and Philadelphia, Pa. It is not clear from an examination of its certificates that it has such authority. It operates 11 trucks, 15 tractors, and 26 trailers, and maintains terminals at Newburgh and Philadelphia, and uses the terminals of other carriers at Secaucus, N. J., and Colonie, N. Y. Its operating revenues and ratios are: For 1954, \$685,326, ratio 101.2; for 1955, \$255,924, ratio 122.2; first quarter of 1956, \$60,928, ratio 109.4.

Taylor's Express Co., also controlled by Holmes, is authorized to transport general commodities, with exceptions, over several regular routes between Boston and Haverhill, Mass., and between Haverhill and Lowell, Mass., serving certain intermediate and off-route points; and over irregular routes between Haverhill and Merrimac, Mass., on the one hand, and, on the other, points in Rockingham and Strafford counties, and a portion of Hillsboro County, N. H. It maintains a terminal at Haverhill, and, jointly with Holmes, at Lowell and Cambridge, Mass., and operates 15 trucks, 4 tractors, and 7 trailers. Its operating revenues and ratios are: For 1954, \$214,875, ratio 97.3; for 1955, \$202,069, ratio 96.3; for 24 weeks ending June 16, 1956, \$102,028, ratio 98.7.

³ Operating ratios are stated in percentages of carrier operating expenses to carrier operating revenues.

Mutrie opposes the application principally to the extent that it would authorize Nelson as the surviving carrier, to [fol. 64] transport machinery or liquid commodities in tank vehicles. Mutrie transports such commodities to the extent authorized by its certificates. Insofar as here pertinent, it is authorized to transport general commodities over regular and irregular routes between certain points in Massachusetts, including Boston, and certain points in Rhode Island, Connecticut, Maine, New Hampshire, and New York, including New York City, between New York City and points in New Jersey within 50 miles thereof, and many different liquid commodities generally between points in an area extending from and including the New England States southward through New York, Pennsylvania and New Jersey to and including a portion of Delaware. It maintains terminals at Waltham, Mass., Willingford, Conn., Manchester, N. H., Woodbridge and Jersey City, N. J., and Pawtucket, R. I.; operates 391 trucks, trailers, tank vehicles, low-bed, platform and pole trailers, etc., its investment in which is approximately \$2,827,040. It employs 246 persons. Its gross revenues and operating ratios are: For 1954, \$3,013,885, ratio 96.7; for 1955, \$3,463,547, ratio 96.9; and for 1956 to July 1, \$1,740,587, ratio 98.7.

Smith is authorized to transport, over regular routes, general commodities, with exceptions, between Meriden and Boston, Carteret, N. J., and four points in Connecticut, between Hartford, Conn., and Sturbridge, Mass., and between Waterbury and Bridgeport, Conn.; over irregular routes, between points in Connecticut, and between Meriden, on the one hand, and, on the other, nine points in Massachusetts, Passaic, Paterson and Newark, N. J., and points within ten miles of the latter, and Albany, N. Y., and points within ten miles thereof; over irregular routes, heavy machinery, between points in Connecticut, and between Meriden, on the one hand, and, on the other, points in New Hampshire, [fol. 65] Massachusetts, Rhode Island, New York, Pennsylvania and New Jersey. It has terminals at Wallingford, New York City and Boston, and operates 6 trucks, 41 tractors, and 75 trailers. Its operating revenues and ratios are: For 1954, \$1,194,899, ratio 98.4; for 1955, \$1,216,426, ratio 99.6; for first quarter of 1956, \$316,126, ratio 96.

National is authorized to transport general commodities, with exceptions, over regular routes between Perth Amboy, N. J. and Hartford serving all intermediate points and the following off-route points: Five in New York, 22 in Connecticut, 6 in Massachusetts, points in Bergen, Essex, Hudson, Union, portions of Passaic and Middlesex, counties, in New Jersey, and points in the New York commercial zone as defined by the Commission; between certain points and off-route points in Connecticut; between New Freedom, Pa., and junction of U. S. Highways 1 and 9, serving, among others, the intermediate points of Baltimore, Camden, and Philadelphia; and finally between certain other points in Connecticut, Massachusetts, and New York. It maintains terminals in Boston, Holyoke, Mass., Hartford, New London, Conn., Bridgeport, Kearney, N. J., Baltimore, Philadelphia, and Lancaster, Pa., and operates 40 trucks, 90 tractors and 150 trailers. Its operating revenues and ratios are: For 1954, \$2,730,157, ratio 100.4; for 1955 \$2,894,374, ratio 98.9; for the first quarter of 1956, \$804,374, ratio 99.0.

Lombard is authorized to transport general commodities, with exceptions, over regular routes generally between numerous specified points, serving numerous intermediate and [fol. 66] off-route points, in an area extending from Marcus Hook, Pa., northward to and including Massachusetts. The area includes parts of Pennsylvania, New Jersey, New York, Connecticut, Rhode Island and Massachusetts. It has terminals at Philadelphia, Elizabeth, N. J., Bridgeport, Waterbury, South Windsor, Conn., Worcester and Boston, and operates 38 trucks, 103 tractors and 128 trailers. Its operating revenues and ratios are: For 1954, \$2,561,004, ratio 100; for 1955 \$2,580,090, ratio 100.3; for the first quarter of 1956, \$779,771, ratio 100.9.

Downing is authorized to transport general commodities, with exceptions, over regular routes between Hartford, Conn., and Lancaster, Pa., serving all intermediate points, and certain off-route points in New Jersey and Pennsylvania, and over irregular routes between points in Connecticut, Massachusetts, a portion of Rhode Island, southeastern New York, and portions of New Jersey and eastern Pennsylvania. It has terminals at Newington (Hartford), Conn., Worcester and Philadelphia, and operates 20 trucks,

40 tractors, 60 trailers, and 8 flatbeds. Its operating revenues and ratios are: For 1954, \$1,047,155, ratio 98.9; for 1955, \$1,148,710, ratio 102.3; and for the first quarter of 1956, \$360,369, ratio 102.4.

Westchester is authorized to transport over regular routes new furniture and certain toys from certain points in Massachusetts to certain points in New York and New Jersey including service to such intermediate points as New York City, Jersey City, Albany, Hartford and Meriden and four off-route points in Massachusetts and New York; over irregular routes, special commodities, such as ladies and children's wearing apparel, new furniture, baby and [fol. 67] doll carriages, paint and paint products, and household goods, from, to and between points generally in portions of Pennsylvania, New Jersey, New York, Connecticut, Massachusetts, Vermont, and Rhode Island; and general commodities, with exceptions, between New York City and Westchester County, on the one hand, and, on the other, points in Fairfield County, Conn. It operates 20 tractors and 24 trailers.

Jackson is authorized to transport over irregular routes, new furniture between New York City and points in New York and Connecticut within 50 miles of Columbus Circle, in that city, and between New York City, on the one hand, and, on the other, Philadelphia and points in New Jersey. It operates 3 trucks, 10 tractors and 14 trailers.

M & M Transportation Company, of Boston, is interested here only in the territory extending from, and including, Rhode Island and Massachusetts on the north to and through New York City to points south thereof. It is not interested in local service between points in Massachusetts, Rhode Island and Connecticut. It is authorized to transport over eight regular routes general commodities, with exceptions, between Boston and Philadelphia serving specified intermediate and off-route points in Massachusetts including Springfield, Worcester and 20 mile area, and 35 mile Boston area, Connecticut, including Hartford and New Haven, Rhode Island, including Providence and points in Rhode Island and Massachusetts within 30 miles thereof, Hudson and Kingston, N. Y., Camden, N. J. and points in New Jersey and Pennsylvania within 30 miles of City Hall

in Philadelphia, New York City, points in three New Jersey [fol. 68] counties, portion of Long Island, Newark, N. J., and points within 25 miles thereof; over regular routes, fish and fish oils from Barnstable, Mass., to New York City; packinghouse products from Boston to Baltimore and between Plymouth and Barnstable, Mass., and New York City; and cranberries from Plymouth and Barnstable to New York City. It maintains terminals with a supply of over-the-road equipment at New York City, Newark, Philadelphia, Springfield, Providence, Worcester and Boston, and operates 190 tractors, 258 trailers and 73 pickup trucks, supplemented by an average of four leased units per work day. Its investment in transportation facilities, equipment and terminals was \$2,188,407 as of January 1, 1956. It employs 850 persons, including 12 solicitors. Its operating revenues and ratios are: For 1954, \$7,481,186, ratio 92.5; for 1955, \$7,233,531, ratio 95.8, for the first six months of 1955 and 1956, respectively, \$3,602,497, ratio 95.96, and \$4,330,149, ratio 91.74. M & M provides daily overnight service on both truckload and less-than-truckload shipments between all points. It can meet the public demand for its services and has experienced little complaint. Its assistant traffic manager expressed little more than an awareness of the existence of Nelson and Gilbertville, and testified that M & M is very much interested in the application to the extent that it "would be seriously affected by any new competition in a field already overburdened with competitive factors"; and that there may be 65 to 70 general-commodity-common-motor carriers operating between points in Massachusetts in which M & M is interested and the New York area.

[fol. 69] Insofar as pertinent here, Adley Express Company, New Haven, Conn., is, generally speaking, authorized to transport general commodities, with exceptions over some 30 regular routes between Boston and Philadelphia through Connecticut, Rhode Island, New York and New Jersey, serving all intermediate points and as off-route points all points in Massachusetts, Rhode Island and Connecticut, in twelve counties in northern New Jersey, within 15 miles of City Hall, Philadelphia and in the New York commercial zone. It has thirteen terminals and 25 call sta-

tions within the area here involved, and operates 205 trucks, 229 tractors and 418 trailers, some of which are stationed at each terminal. Its investment in terminals, equipment and facilities as of January 1, 1956, was \$6,644,894. It employs 1,300 persons, including 40 solicitors. Adley's operating revenues and ratios are: For 1954, \$9,479,787, ratio 89.4; for 1955, \$10,355,065, ratio 94.3; for the first six months of 1956, \$5,935,578, ratio 89.68. It provides overnight service on both truckload and less-than-truckload traffic between all points pertinent here. During 1955 it handled 195,646,443 pounds, and during the first 6 months of 1956, 65,904,639 pounds, of freight between points in Massachusetts, on the one hand, and, on the other, points in New Jersey, and Philadelphia and points in Pennsylvania within 25 miles thereof. In this proceeding, it is interested in the intra-New England traffic and that in the area extending southward therefrom to the New Jersey area and Philadelphia. It has experienced some competition from Gilbertville and Byrnes, but not to any extent. There are some 50 or 60 competitive general commodity [fol. 70] motor carriers between Massachusetts and Philadelphia. In the Massachusetts-Rhode Island-Connecticut area, there are at least 100 such competitors, about 20 to 25 of whom are substantial. Adley recently acquired the Savage Truck Line operating rights, thus extending its authority south from Philadelphia to Virginia and North Carolina.

Hemingway Brothers Interstate Trucking Company, New Bedford, Mass., is authorized, insofar as pertinent, to transport general commodities, with exceptions, over regular and, in part, irregular routes in the general area from Philadelphia northward served by Adley. Their operations are substantially parallel, except that Hemingway serves New York City and Adley does not. Hence, their interests in the application are substantially the same. It was stipulated that Hemingway's witness would, if called to testify, give substantially the same answers to questions as those given by Adley's witness. Hemingway maintains 15 terminals with road equipment and 62 call stations, in all, the vast majority of which are in the area affected. It operates 98 trucks, 242 tractors and 384 trailers and em-

employs 903 persons. Its investment in terminals, equipment and other facilities as of January 1, 1956, was \$2,626,270 against which the outstanding obligations were \$837,766. Its operating revenues and ratios are: For 1954, \$7,577,087, ratio 96.53; for 1955, \$7,476,846, ratio 97.7; and for the first six months of 1955 and 1956, respectively, \$3,814,008, ratio 99.43, and \$4,242,471, ratio 97.84. It has lost some traffic to Gilbertville destined from two points in New Jersey to points in Massachusetts, most of which it has regained. It attracts business from Gilbertville and other [fol. 71] carriers and they from it. Hemingway has acquired extensive operating authority by several purchases.

MC-F-6178

In MC-F-6178, the Bureau of Inquiry and Compliance asserts that the over-all picture presented by the evidence amply demonstrates that Nelson and Gilbertville and the other respondents have violated the prohibitions in section 5 against control or management in a common interest of two or more carriers and that the application for approval of the merger is merely a tardy attempt to secure approval of an already unlawfully accomplished condition and that while individually the various incidents and circumstances shown by the record may not be conclusive, collectively, they clearly spell out a continuous existence, since the acquisition by Kenneth Nelson of the Gilbertville shares, of management and operation of the two carriers in a common interest. The Bureau, therefore, recommends a finding that the circumstances revealed by the record require the entry of an order calling upon the respondents to discontinue violation of the provisions of section 5(4) of the act. Although the motor carrier protestants and the motor carrier and railroad parties in interest proclaim their support of the investigation and argue that respondents are in violation of said section, none introduced evidence thereof and none has requested the entry of any corrective order.

Applicants-respondents argue that the leasing of trucks by one carrier to another, the presence of a list of equipment of the lessor carrier in the files of the lessee carrier

[fol. 72] to facilitate leasing, the sharing of telephones, and the friendly business relations between carriers engendered by close family relationship, do not constitute control in a common interest; that the few instances of record of the carriage by one carrier respondent of shipments of the other should be ascribed to human error and not given serious consideration; that Kenneth Nelson's continued employment by Nelson as a tariff consultant in 1953 concurrently with his management and operation of Gilbertville did not result in common control or management of the two carriers.

The pertinent part of section 5(4) provides that--

"(4) It shall be unlawful for any person," without the approval and authorization of the Commission, "to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, * * * in any manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated * * * in violation of" the foregoing provisions. "As used in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management."

Paragraph (5) of section 5 declares that any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two or more carriers if such transaction--

- (a) is by a carrier and its effect is to place such carrier together with persons affiliated with it in control of another carrier;
- (b) is by a person affiliated with a carrier and the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;
- (c) is by two or more persons acting together, one or more of whom is a carrier or affiliated with a carrier;

[fol. 73] and its effect is to place such persons and carriers and persons affiliated with such carrier or carriers in control of another carrier.

Paragraph (6) of section 5 provides that "a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier * * * it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person, will be managed in the interest of such other carrier." Section 1(3)(b) of the act declares in pertinent part that for the purposes of section 5, the word "control" * * * shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation * * * or through or by any other direct or indirect means and to include the power to exercise control."

In *Colletti—Control—Comet Freight Lines* (1942), 38 M.C.C. 95, the Commission found that a transaction whereby a person in control of a carrier through ownership of 60 percent of its voting stock would become manager of the business of another carrier was subject to the provisions of section 5. In that case the scope of the word control was discussed:

"Section 5 is remedial in character and should be liberally construed. It is clear that the section was intended to cover acquisitions of control by any means and irrespective of whether or not the person holding control might legally enforce such control. 'Control' is generally defined to be the power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. Control is frequently said to be synonymous with manage. There is nothing in the act to indicate that the term is used in other than its ordinary sense. It is obvious that there may, and do, exist different types of control. For instance, there [fol. 74] may be absolute control which would imply complete dominion over the subject matter; or there may be joint control as where two persons have equal power thereover; there may be direct or indirect con-

trol; or there may be actual as distinguished from legal control. The words 'control or management' as used in section 5 embrace all forms and types of control or management. . . . The existence of legal control in one person does not prevent concurrent existence of actual control in another through acquiescence of, or a management contract with, the former. The fact that Colletti, theoretically at least, would be subject to the orders of Comet's board of directors does not negative possession by him of actual control within the meaning of the statute." 38 M.C.C. 97.

The history of the broad language contained in section 1(3)(b) and in paragraphs (4), (5) and (6) of section 5 makes it clear that the existence of control must be determined by a regard for the "actualities" of intercorporate and intercarrier relationships and that by investing the Commission with the duty of ascertaining control, Congress did not imply artificial tests of control. One of the kinds of transaction specified in section 5(5) which shall be deemed to accomplish or effectuate the control or management of two carriers in a common interest is a transaction by a carrier, resulting in such carrier and persons affiliated with it, taken together, acquiring control of another carrier. The definition of affiliation in section 5(6) assumes that the person with respect to whom the question of affiliation arises will acquire control of the carrier in question; but, continues with the statement that affiliation of such person with another carrier shall be found if it is reasonable to believe that the carrier, control of which has been or will be effected by such person, will nevertheless be managed in the interest of such other carrier. The definition recognizes that control of the carrier by the person in question does not negative the coexistence of his affiliation with the other carrier. Both may be present [fol. 75] and it does not imply affirmative domination of the person by the carrier with which he is affiliated. The term "managed" obviously means "managed in any material degree." *Greyhound Corp.—Investigation of Control—Southern Limited* (1946), 45 M.C.C. 59, 77-79.

Paragraphs (4), (5) and (6) were planned by Congress in the light of what had theretofore been done through

myriad devices without Commission supervision. They are necessary because of the difficulty in establishing as a matter of law in many cases where as a matter of fact it is known, that control or management in a common interest of two or more carriers is effectuated or actually exists. *Id.*, p. 77.

Webster's New Collegiate Dictionary defines the verb "manage" as "To control and direct; to conduct, guide, administer" and "To direct affairs; to carry on business or affairs"; and the noun "management" as "conduct; control; direction."

The case in hand appears to be on the borderline. Nevertheless, taking into view all of its many facets in the broad and penetrating light of the statute and its past application, a reasonable conclusion is impelled that control and management of both Nelson and Gilbertville in a common interest were effectuated at some time which cannot be determined on this record and are presumably continuing. Family ties, of themselves are not evidence of action to a common purpose. However, the natural and commendable impulse of a member of a family to cooperate with other members in business affairs as in other fields may push the cooperation beyond the permissible bounds of remedial legislation. The family tie provides an urge in addition to the profit motive. Family cooperation, therefore suggests some scrutiny of the interrelationship of family enterprises in the administration of such legislation as section [fol. 76] 5 of the act. There is no doubt that the individual respondent, members of the same family, were affiliated with Nelson or Gilbertville.

Mrs. Linnea Nelson and two of her sons, Oscar and Charles, set up the business of Nelson in 1930. Upon incorporation of the business in February 1948, 496 of the 500 shares authorized were issued to her and one of each four sons, Oscar and Charles Chilberg and Clifford and Kenneth Nelson. About three months later, she distributed 196 of her shares equally among the sons so that each then had 50 shares. After her death bequests of 42 shares each were distributed from her estate to each of her seven children, and the corporation bought the six remaining shares. On June 30, 1951, and early in 1953, Oscar sold

his 50 and 42 shares, respectively to Charles. On September 22, 1951, and in early 1953, Kenneth sold his 50 and 42 shares, respectively, to Clifford. Both Oscar and Kenneth resigned as officers and directors upon the sale of their shares in 1951. Charles and Clifford, having acquired shares from the other devisees, have been and now are the owners of 45.75 percent of the shares outstanding, or 226 each. The other 42 shares are held by a sister, Greta Nelson Carlson.

[fol. 77] The sale by Kenneth of his shares and his resignation from office in September 1951, did not mark severance of his connection or affiliation with the company. Apparently, he continued to occupy office space at Nelson's headquarters in Rockville-Ellington. As a "free lance" tariff consultant he was employed and paid by Nelson over \$15,000 in 1952 and over \$13,000 in 1953; payments being made upon bills presented periodically by Kenneth. The nature and extent of the services, if any, rendered to Nelson does not appear of record. Nelson was Kenneth's only client.

In January 1953, while still consultant for Nelson, he became interested in, and advised with one, Solomon, his accountant and financial adviser, concerning the purchase of all of the capital stock of Gilbertville. Solomon was also accountant and financial adviser for Nelson and the Nelson-Chilberg family and for Gilbertville and Byrnes after they were acquired. On March 1, 1953, Kenneth took control of, and began to operate, Gilbertville. In July 1953, with the help of Oscar's name as co-maker on promissory notes, he financed and completed the purchase. Kenneth became the president and Oscar, to whom 48 shares had been transferred, presumably at Kenneth's direction, became treasurer. A qualifying share was issued to Kenneth's attorney. On April 1, 1954, Oscar who had paid nothing for the 48 shares, transferred them to Kenneth who, in turn and without receiving any consideration, transferred 24 to his wife Phyllis and 24 to Gilbertville's terminal manager at Gilbertville to enhance his "prestige". Kenneth, nevertheless, acknowledged that he beneficially owns and [fol. 78] controls such shares. At the same time, Oscar re-

signed as treasurer and director, and shortly thereafter the terminal manager was elected a director and Kenneth as treasurer (in addition to the presidency). Oscar thereafter devoted himself to the operation of his garage at Philadelphia, which, incidentally, is patronized by Nelson.

Since Gilbertville's "administrative and general" expense for 1953 amounted to only \$4,389.37, and since its net after taxes in that year was \$20,314.36, a reasonable inference may be drawn that Kenneth received little or nothing as salary in that year, and, consequently, that his "earnings" of over \$13,000 as tariff consultant to Nelson were in the nature of a subsidy to Gilbertville. To offset such an inference we have the statement of the accountant that a portion of the \$20,059 shown on its 1955 balance sheet as "Notes payable officers" represents in part unpaid salary owing to him. Even so, the Nelson payment to him in 1953 was at least the equivalent of a loan, without interest, to Gilbertville since it received Kenneth's services without any outlay therefor in that year.

When Kenneth took control of Gilbertville on March 1, 1953, after advising with his accountant and financial adviser, it had a deficit of \$39,868. As of December 31, 1953, its assets amounted to \$69,383 and liabilities to \$50,447 (after net income of \$20,314 after taxes), with a net worth of \$18,935. The accountant-financial adviser testified that because of Gilbertville's "precarious" financial condition, poor credit standing and insufficiency of working capital, he volunteered advice in January 1954, to Kenneth to seek [fol. 79] a merger with Nelson. Thereafter, he repeated his advice, and spoke to Charles Chilberg, president of Nelson of the possibility of such a merger. He suggested merger with none other than Nelson because he knew it was susceptible to a "merger deal" since Charles and Clifford were interested in the expansion of routes to the south. Notwithstanding Gilbertville's "precarious" condition, activity with respect to the suggested merger was suspended while arrangements for two acquisitions were made. By April 28, 1954, arrangements had been made for the purchase by Gilbertville of the operating rights of Louis Marmer, doing business as Wolff's Express, for \$7,500 in

cash. Pursuant to approval of the transaction by the Commission on June 16, 1954, it was consummated and the purchase price was entered in Gilbertville's books as an intangible asset to be amortized. In April or May of 1954, Charles Chilberg and Clifford Nelson negotiated the purchase by them of the capital stock of Byrnes, which after approval by the Commission in MC-F-5749, was finally consummated August 21, 1956, with the understanding that after certain tax advantages have been exhausted Byrnes will be merged with Nelson. Meanwhile, Charles and Clifford had been operating Byrnes under temporary authority. Byrnes' general commodity authority complements that held by Gilbertville after its acquisition of Mariner's operating rights. By interchange, Byrnes and Gilbertville can provide a through general commodity service between points in Massachusetts, Rhode Island and Connecticut, on the one hand, and, on the other, points as far south as the District of Columbia.

[fol. 80] The accountant adviser testified that when he spoke to Charles Chilberg about the merger in April 1954, he drew attention to the operating economies that could be expected through the elimination of duplications. However, since Gilbertville was running a deficit in earned surplus and Nelson was apparently financially sound, it is not a violent assumption that Kenneth, Charles and Clifford as early as the forepart of 1954 saw in the merger financial advantages to Gilbertville's owner to whom it was much indebted and the fulfillment of Nelson's ambitions to expand to the south with the aid of the Byrnes' operating rights, if, indeed, Nelson's or the Nelson-Chilberg ambitions to expand had not originally motivated the purchase of Gilbertville by Kenneth. Gilbertville's financial condition at that time was certainly not such as to make it attractive as an investment. As of December 31, 1953, it owed Kenneth \$11,792 which had increased to \$15,024 by December 31, 1954, and to \$20,095 by July 31, 1956. Moreover the promissory note of \$30,000 to the Bank signed by Kenneth and Oscar is still unpaid. Another advantage is that the merger will enable Nelson to transport its narrow range of commodities throughout Gilbertville's general commodity authority areas.

Activities to effect the merger were resumed in January 1955, at a conference between Kenneth, Charles, Clifford, their attorney and the accountant-adviser. On August 18, 1955, the merger agreement was signed and in October 1955, the instant application was filed.

In dealing with the fitness of Nelson to succeed to and exercise Gilbertville's operating rights, some of the opposing motor carriers argue that in order to "condition" [fol. 81] the operations of the latter to be acceptable, Nelson sacrificed some of its traffic to Gilbertville and that this circumstance is evidence of management and control in a common interest. They point to the rapid expansion in Gilbertville's operating revenues from \$75,489 in 1953 to \$423,237 in 1955 and to \$444,777 in the first seven months of 1956 as compared with the slower increase of Nelson revenues from \$895,774 in 1953 to \$924,607 in 1955 and to \$630,607 in the first seven months of 1956. Some of the opposing carriers also assert that of the 1,369 shipments shown on exhibit 26 as moved by Gilbertville, approximately 461 or 33 percent consisted of basic textile commodities such *inter alia* as nylon cotton, cotton piece goods, etc. However, an examination of the exhibit in the light of Nelson's narrow commodity operating authority (materials used in the manufacture of cloth, waste materials resulting therefrom and supplies and materials used in the transportation or processing of such commodities when moving to or from places of processing) and its limited areas of origin and destination discloses that no more than 15 percent of the shipments could reasonably or lawfully have been transported by Nelson. It is doubtful that Nelson sacrificed much, if anything, in the way of business to build up Gilbertville. However, it may reasonably be inferred from the phenomenal growth in its revenues that Charles Chilberg and Clifford Nelson and other members of the Chilberg-Nelson family extended a helping hand to Gilbertville in the development of its custom.

An appraisal of the matters related above beginning with the employment of Kenneth by Nelson as a "tariff [fol. 82] consultant" after severance of his connections as an officer and shareholder is persuasive that an overall plan or project to create a larger and more significant

motor carrier in the New England-Middle Atlantic area using Nelson as a nucleus was conceived and followed. Whether it was conceived before or at the time Kenneth negotiated for purchase of Gilbertville or at some later time is not revealed. Certainly, it commenced to take shape in April or May of 1954 when the Byrnes and Marmer acquisitions first received attention. At any rate, events and the interrelations of the respondent carriers following the purchase of Gilbertville mark their operation as that of a unified organization.

Nelson provides a pool of equipment to which Gilbertville constantly, frequently and readily resorts by means of handy lease forms. Both draw upon the same group of drivers, whose names and other information concerning them were for convenience kept in the files of both. Both occupy the same headquarters and, with few exceptions, use the same telephones. Of a total of six terminals between them, both occupy the same terminals at four points. Three are under lease from Bergson. At two of the four, Gilbertville pays its share of the rentals, at the other two it pays the entire rental. For economy or convenience they carry one another's shipments. It is clear that each operates under some managerial direction from officers or employees of the other. The divisions of revenues on traffic interchanged between them is upon a fixed percentage basis. Nelson does all of the billing on such traffic. By arrangement, interchange of traffic between them is effected by an "interchange" of equipment under lease, whereby the [fol. 83] same vehicle and driver accomplish the through movement under leases prepared in advance of such interchange. To some extent Nelson repairs and services motor equipment owned and operated by Gilbertville. Their accounting services and financial advice come from the same source. They are extremely liberal one with the other with respect to debit balances. As of November 8, 1955, Nelson owed Gilbertville approximately \$39,000 for interline settlements and Gilbertville owed Nelson some \$19,000 in equipment rentals. It may be reasonably inferred that, upon consummation of the merger, if approved, Kenneth Nelson will again join Nelson as a responsible officer or employee. Charles Chilberg under questioning neither af-

firmed nor denied that probability, and it is noted that the elimination of Kenneth's salary as president of Gilbertville was not listed among the economies to be effected by the merger.

Although no one of the foregoing acts, practices and arrangements affords a clear indication of control or management in a common interest, they, together with the acquisitions referred to above and the circumstances surrounding them, require a finding that control and management in a substantial degree of Nelson and Gilbertville in the common interest of Nelson and its shareholders and of Gilbertville and its shareholders have been accomplished or effectuated and presumably are being maintained. *Greyhound Corp.—Investigation of Control—Southern, Ltd.* (1946), 45 M.C.C. 59, 79; *Ratner—Investigation of Control—Nowak Trucking Co.* (1948), 55 M.C.C. 104, 109-110.

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Protestants, including the rail carriers, and the other opposing motor carriers urge denial of the application for [fol. 84] the reason that the proposed merger would not be consistent with the public interest because (1) Nelson is not fit to perform the service under the merged operating rights, and (2) the transaction would result in the creation of a new or different service without showing a need therefor to compete with the established services of protestants and other opposing carriers. The Bureau of Inquiry and Compliance urges denial only upon the ground of want of fitness. Nelson's unfitness is demonstrated, it is said, by the participation of itself and those who control it in accomplishing or effectuating control or management in a common interest in violation of section 5(4) and by Nelson's violations of the act in other respects and of the Commission's safety and other regulations. Mutrie, Holmes, Newburgh and Taylor urge denial, but request that if approval is granted it be conditioned upon the cancellation of all regular route, and certain irregular route, authority contained in Gilbertville's certificate as dormant. Applicants-respondents maintain that past violations, if

any, do not constitute a bar to the approval of a transaction such as here proposed.

The violations, other than of section 3, as shown by the record, consisted of one instance of destruction of records, about four instances of failure to submit drivers' logs for inspection by Commission investigators, two of failures by drivers to keep their logs properly, and two of driver failure to keep logs, one of failure to require a doctor's certificate of a driver, approximately six of failure to have certain safety equipment on trucks or to keep trucks in safe [fol. 85] operating condition, several of operations beyond operating authority by both carriers through failure to observe proper gateways, through carriage of unauthorized commodities or by operation beyond the authorized routes or territory of the carriers. Such violations were discovered during the course of investigations on about ten scattered days between October 22, 1954, and June 1, 1956, by Commission employees. Appellants-respondents offer in mitigation the statement that when such violations were drawn to Kenneth Nelson's attention, corrective action was taken. However, many of the described violations were committed by or are ascribable to Nelson.

It is true that the Commission has on many occasions found that past violations of the act and the regulations by an applicant are not a bar to the granting of his application for a certificate or of approval of an application under section 5. In *Lieberman Extension of Operations—Michigan* (1948), 48 M.C.C. 399, 402-404, the violations of record were many and varied, but upon consideration of all of the evidence the Commission found applicant fit. In *Riss & Co., Inc., Extension—Explosives* (1955), 64 M.C.C. 299, certain applicants were found fit, notwithstanding previous violations, the Commission stating at page 350 that:

"There is no inflexible rule by which an applicant's fitness can be determined. Consideration should be given to the nature and extent of past violations of our safety rules and regulations, and of States and city laws and regulations, the effect of such violations upon uniform regulation, the mitigating circumstances

shown to exist or to have existed, whether the carrier's past conduct represents a flagrant and persistent disregard of the provisions of the act and our rules and regulations thereunder, and the extent to which the carrier is attempting to take corrective measures to bring its operations in compliance with the law and regulations."

[fol. 86] In *Baggett—Control—Walker Hauling Co., Inc.* (1955), 65 M.C.C. 522, approval of a transaction under section 5 was granted although control had previously been accomplished in violation of that section. Therein, it was written:

"It is apparent that the parties have, for all practical purposes, consummated the major portion of the transaction, with a purchase price of \$1,000,000, reserving for our consideration and approval only the remaining portion involving the purchase of 5 shares of stock for \$675, which, obviously, is of little consequence so far as the terms and conditions of the whole transaction and the acquisition of control of the carrier are concerned. * * * The evidence otherwise shows the transaction to be in the public interest, and denial is not warranted solely because of the law violation; but our approval is not to be understood as a condonation * * *."

In the case at bar, there is no evidence of extensive or flagrant violations of either the act or the regulations. The violations shown and the circumstances in which they occurred do not establish a persistent disregard for regulation. Rather, they appear to be the result in some cases of ignorance of the requirements, and in others of a degree of carelessness and not wilfulness. The principals are youthful and are of such caliber that their experiences at the hearing herein can be expected to make them more conscious of and responsive to regulation. They earnestly deny that what has been done in respect of Gilbertville and Nelson amounts to effectuation of control in a common interest and on this record their view on that point cannot be

said to be wholly groundless. Such control is not the result of any one act or transaction, but is the result of an evolution and a cumulation of acts, transactions and practices, the ultimate consequence of which may not be readily obvious [fol. 87] to the layman. A finding of unfitness by reason of violations is not warranted.

Adley, M & M, and Hemingway maintain on brief that approval would result in the creation of a new general commodity operation extending between all points in Massachusetts, Connecticut and Rhode Island through appropriate gateways, on the one hand, and, on the other, points in New Jersey, Philadelphia and surrounding area, defined areas in Maryland and Delaware and in and around the District of Columbia. It is pointed out that Nelson operations are confined by its certificate to a very limited class of commodities in the textile field within the foregoing area, and that the new operation to emerge from the unification of the operating rights of Byrnes and Lewis Marmer, both lately acquired by the applicants, would bear little, if any, resemblance to the very limited operations conducted under the various right previously in separate ownership. Adley et al., by an analysis of an exhibit placed in the record by Gilbertville upon which are listed approximately 1,400 shipments handled by it between May 1 and May 11, 1956, attempt to show how the pattern of its operations has already changed since its acquisition by Kenneth Nelson on March 1953 from intrastate in Massachusetts and intra-New England to the New England-New York City area. M & M, Adley and Hemingway assert that collectively they provide service between all major areas involved in the application and that they have experienced no serious competition from Gilbertville. Nothing is said concerning any competition experienced from Gilbertville- [fol. 88] Byrnes' operations between the New England area and the New Jersey, Pennsylvania, Maryland, District of Columbia areas.

Mutrie, Holmes, Newburgh and Taylor, in their brief, also contend that Gilbertville's pattern of operations has changed and that approval would engender a new service unlike the previous services without any proof of public

need therefor. Holmes holds cross-haul authority to transport general commodities between all points in Massachusetts, Rhode Island, Connecticut and New York City and points within 20 miles thereof. Thus, operations instituted under Gilbertville's certificate are claimed to be competitive with and detrimental to Holmes' operations and are new competition inspired by Gilbertville while in violation of section 5 of the act. Also, it is said, approval would authorize a new operation and new competition by Nelson between Massachusetts and Rhode Island points and Philadelphia in direct competition with the Holmes-Newburgh through service. As already mentioned, it is not clear that Newburgh's certificate authorizes operation by it between New York City and Philadelphia.

None of the other six opposing motor carriers filed briefs but announced at the hearing their opposition upon the general grounds that each operates to the extent of its operating authority, each believes Gilbertville's operating authority to be dormant in part and that the new competition to result from the merger would have an adverse effect upon it.

The eastern territory railroads say that the merger would enlarge Nelson's operating authority to some extent territorially and give it a vastly expanded commodity authority without proof of public need; that existing motor carriers are providing adequate service and that the application should be denied for these reasons, in addition to that for lack of fitness.

The evidence indicates that there are some 50 or 60 general commodity motor carriers competing for traffic between Massachusetts and Philadelphia, and at least 100 such carriers, 20 to 25 of whom are substantial, competing in the Massachusetts-Rhode Island-Connecticut area.

The difficulty with the basic opposition is that the competition which is feared is either already an accomplished fact or capable of becoming so even though the present application is denied. Gilbertville could still continue its operations under its general commodity authority intra-New England and between that area and the New York City-New Jersey areas. It could still inaugurate, if it has not done so already, or continue interchange with Byrnes in

the New York City area, providing through service between the New England points and those south of New York City. Denial of the application would not frustrate such competition.

Moreover, the competition is handicapped and would continue to be notwithstanding approval of the application by the requirements for observance of Gilbertville's principal present gateway restrictions. To provide service under general commodity authority between Massachusetts points, on the one hand, and, on the other, New York City and points in New York and New Jersey within 20 miles thereof, all operations must be conducted through the Town of Hardwick. Between any point in Massachusetts and any [fol. 90] point in Rhode Island or Connecticut operations must pass through Palmer or within 10 miles thereof. Service may not be provided between any point in Rhode Island or Connecticut, on the one hand, and, on the other, New York City or any point in New York or New Jersey within 20 miles thereof without operations through that part, if any, of the Town of Hardwick situated within 10 miles of Palmer. *Actna Freight Lines, Inc., Interpretation of Certificate* (1948), 48 M.C.C. 610; *La Mere and Conroy—Purchase—Ziffirin* (1949), 55 M.C.C. 501, 511. Through service, under Gilbertville's general commodity authority, except insofar as it may now lawfully be provided by interchange with Nelson, may not be provided between Rhode Island and Connecticut. *G. & M. Motor Transfer Co., Inc., Common Carrier Application*, (1944), 43 M.C.C. 497, 500.

The evidence shows a tremendous increase in Gilbertville's business from 1953 when operating revenues were \$75,489 as compared with the first seven months of 1956 when they were \$444,777. Notwithstanding, none of the opposing carriers offered evidence of any loss of traffic by them to Gilbertville from 1953 to August 1956. Mutrie and Holmes as well as Adley, M & M and Hemingway are of the opinion that this increase in traffic is illegal because it was developed under a unified control and at the expense of Nelson and, hence, should be given no consideration as evidence of consistency with the public interest. As seen, the evidence does not bear out a sacrifice on Nelson's part, perhaps because there are not very many origin-destina-

tion combinations common to the operating authorities of the two carriers with respect to Nelson's narrow range of [fol. 91] commodities. To what extent, if any, Gilbertville's increase in traffic is ascribable to the unified management, it is impossible to determine from this record. Moreover, if it be assumed that the increase is directly traceable to such management, neither the increase nor the operations conducted in handling the traffic involved can be said to be illegal.

Insofar as the record here reveals any facts upon the subject, it shows that neither the motor carrier nor railroad opponents will be adversely affected to any appreciable extent by the merged operations. Cf. *Kaplan Trucking Co. —Purchase—Hessler Cartage Co.* (1956), 70 M.C.C. 1, 3. At any rate, all are well established in the areas involved and should be able to meet in the future as they have in the past the additional competition from Nelson under the unified rights.

Although applicants' witnesses indicated that if the operations of the two carriers had been unified during the first seven months of 1956, savings estimated at over \$37,000 would have been realized from various economies, since the witnesses were unable under cross-examination to substantiate the amounts to be saved as to some of the items, it is doubtful that the savings would reach that total. However, the evidence shows that a substantial amount would be saved. This, together with the projected improvements in transportation services from the elimination of gateway observance on certain traffic presently interchanged, in loss and damage claim services, and in safety of operations and the establishment of a new terminal at Springfield are in the public interest and consistent therewith.

[fol. 92] Mutrie and Holmes, Adley, M & M, and Hemingway point out that the evidence fails to show any operations whatever over Gilbertville's general commodity regular routes between Boston and Lowell or to and from the intermediate and off-route points appurtenant thereto or over its irregular routes between points in Massachusetts; that the operating authority therefor is dormant and should be canceled since resumption of operations thereunder by Nelson would confront them with new competition contrary

to the public interest. Holmes and Taylor's, claiming general commodity rights in the latter to operate between New York City and Philadelphia, include Gilbertville's authority to haul sanitary napkins, facial tissues and paper boxes over regular routes from New York to Philadelphia with the above-mentioned authority to be canceled. The same criticism is made and the same disposition is requested with respect to the following irregular route authority contained in Gilbertville's certificate:

Pickled skins, from New York, N. Y., to Ipswich and Peabody, Mass.;

Pulpboard, from Boston, Mass., to Hardwick, Mass.;

Fertilizer and fertilizer materials, from Portland, Conn., to Hardwick, Mass., and points in Massachusetts within 15 miles of Hardwick;

Lime and Limestone products, from Adams and Lee, Mass., to Hamden, Hartford, and East Hartford, Conn., Providence and Woonsocket, R. I., New York, N. Y., and points in New Jersey within ten miles of New York, N. Y.;

Agricultural commodities, from Hardwick, Mass., to Melrose, Conn., and New York, N. Y.

Applicants attached an exhibit to their application containing a list of some 3,500 shipments moved by Gilbertville in the months of March and May 1955, and also submitted in [fol. 93] evidence an exhibit listing approximately 1,400 shipments moved by it in the period May 1-11, 1956, which lists, Kenneth Nelson testified, were fairly representative of all of Gilbertville's operations. An examination of the exhibits shows no shipments transported in regular route service under any of its regular route authority, and none of any of the specified commodities between any of the points named or described in the above-quoted portion of its certificate. It must, therefore, be concluded that the operating rights just referred to are dormant and should be canceled if the proposed transaction is consummated. Approval thereof will be conditioned accordingly. The two exhibits reveal service by Gilbertville within the State of

Massachusetts between interchange points therein on the one hand, and, on the other, an unascertainable number, less than 40, of origin or destination points therein. It cannot, therefore, be concluded that the authority to operate between points in Massachusetts is dormant.

Employees would not be adversely affected by the transaction. The increase in Nelson's fixed charges would not be contrary to the public interest. The findings herein will be conditioned to require that Nelson shall write off immediately following the consummation the amount which would be assigned to its "Other Intangible Property" account as a result of the acquisition and merger. Following the usual practice in such cases, the amounts to be recorded on its books as a result of the transaction will not be approved at this time, but will be reserved for consideration upon receipt of the statement to be filed as required by the order herein showing all expenditures and the accounting proposed to record the transaction.

In No. MC-F-6099, the Commission should find that the acquisition by the L. Nelson & Sons Transportation Co., of [fol. 94] control of Gilbertville Trucking Co., Inc., through acquisition of its capital stock by exchange, the concurrent merger into the former of the operating rights and property of the latter for ownership, management, and operation, and the acquisition by Charles G. Chilberg and Clifford J. A. Nelson of control of the operating rights and property through the control and merger, upon the terms and conditions set forth, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5(2)(a) and will be consistent with the public interest and that, if the authority herein granted is exercised, The L. Nelson & Sons Transportation Co. will be entitled to operate under that portion of the operating rights in No. MC-87431 described in appendix A hereto, to be embraced in a certificate in its name, with duplications, if any, eliminated; provided, however, (1) that the portion of the operating rights in No. MC-87431 not described in appendix A shall be canceled concurrently with the exercise of the authority herein granted, and (2) that The L. Nelson & Sons Transportation Co. shall immediately write off the amount assigned to its "Other Intangi-

ble Property" account as a result of the transaction, such writeoff to be accomplished in the manner to be determined upon the submission of a statement showing all expenditures and accounting proposed to record the transaction, as required by our order herein.

In No. MC-F-6178, the Commission should find that The L. Nelson & Sons Transportation Co., Gilbertville Trucking Co., Inc., Charles G. Chilberg, Clifford J. O. Nelson, [fol. 95] Greta C. Carlson and Kenneth A. H. Nelson effectuated or participated in effectuating the control and management of the L. Nelson & Sons Transportation Co. and Gilbertville Trucking Co., Inc., in the common interests of such carriers and of the individuals named above, and that all of them participated in the continuance of such control and management, in violation of section 5(4) of the act. In view of the conclusions in No. MC-F-6099, however, the investigation proceeding will be terminated by the order herein subject, however, to reopening for further proceedings in the event that the transaction in No. MC-F-6099 is not consummated and such control and management appears not to have been discontinued.

An appropriate order should be entered.

[fol. 96]

APPENDIX A TO APPENDIX "E"

Operating authority authorized to be acquired and retained by The L. Nelson & Sons Transportation Co.

IRREGULAR ROUTES:

General commodities, except those of unusual value, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between points in Massachusetts.

Between the Town of Hardwick, Mass., on the one hand, and on the other, New York, N. Y., and points in New York and New Jersey within 20 miles of New York, N. Y.

Sanitary napkins, facial tissues, and machinery,

From Hardwick, Mass., to Boston, Mass., New York, N. Y., and points in New York and New Jersey within 20 miles of New York, N. Y.

Materials used or useful in the manufacture and sale of sanitary napkins and facial tissues,

From New York, N. Y., and points in New York and New Jersey within 20 miles of New York, N. Y., to Hardwick, Mass.,

Return with no transportation for compensation, except as otherwise authorized, to above-specified origin points.

General commodities, except those of unusual value, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Palmer, Mass., and points in Massachusetts within ten miles of Palmer, on the one hand, and, on the other, points in Connecticut and Rhode Island;

Between Palmer and Monson, Mass., on the one hand, and, on the other, points in Massachusetts within five miles of Palmer and Monson.

Household goods as defined by the Commission,

Between Palmer, Mass., and points in Massachusetts within ten miles of Palmer, on the one hand, and, on the other, points in Vermont.

[fol. 97] Between Hardwick, Mass., on the one hand, and, on the other, points in Connecticut, New Jersey, New York, and Rhode Island.

Livestock.

Between Palmer, Mass., and points in Massachusetts within ten miles of Palmer, on the one hand, and, on the other, points in Vermont.

[fol. 98]

APPENDIX "F" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

DATE OF SERVICE
MAR 3—1958No. MC-F-6099¹THE L. NELSON & SONS TRANSPORTATION CO.—
CONTROL AND MERGER—
GILBERTVILLE TRUCKING CO., INC.

Decided February 26, 1958.

1. In No. MC-F-6099, application of The L. Nelson & Sons Transportation Co., for authority to acquire control of Gilbertville Trucking Co., Inc., through purchase of capital stock, for merger into the former of the operating rights and property of the latter for ownership, management and operation, and for the acquisition by Clifford J. O. Nelson and Charles G. Chilberg of control of the operating rights and property through the control and merger, denied.
2. In No. MC-F-6178, upon investigation, the control and management of The L. Nelson & Sons Transportation Co., in a common interest with Gilbertville Trucking Co., Inc., found to have been effectuated and to be continuing in violation of section 5(4), Interstate Commerce Act. Order entered directing termination of such violation.

Mary E. Kelley for applicants and respondents.*Francis E. Barrett, Francis E. Barrett, Jr., Robert G. Bleakney, Jr., Hugh M. Joseloff, William Q. Keenan, James G. Lane, T. W. Murrett, Arthur J. Piken, and Kenneth B. Williams* for protestants in No. MC-F-6099 and interested parties in No. MC-F-6178.

¹ This report embraces No. MC-F-6178. The L. Nelson & Sons Transportation Co.—Investigation of Control—Gilbertville Trucking Co., Inc.

Ellis F. Gregory, Nell Guinn and Herman F. Mueller for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

REPORT OF THE COMMISSION

DIVISION 4. COMMISSIONERS WINCHELL, MINOR AND WALRATH

BY DIVISION 4:

Exceptions were filed by applicants, the Bureau of Inquiry and Compliance, herein called the Bureau, and certain rail and motor protestants to the examiner's proposed report in No. MC-F-6099, and applicants and the [fol. 99] protestants replied to each other. Applicant's exceptions contain a petition requesting a waiver of Rule 1.86 of the General Rules of Practice for the reasons hereinafter stated. Our conclusions in No. MC-F-6099 differ from those of the examiner:

The E. Nelson & Sons Transportation Co., of Ellington, Conn., and Gilbertville Trucking Co., Inc., of Gilbertville, Mass., herein called Nelson and Gilbertville, respectively, by joint application filed October 6, 1955, in No. MC-F-6099, seek authority under section 5 of the Interstate Commerce Act for (1) the acquisition by Nelson of control of Gilbertville through purchase of its capital stock, and (2) merger of the operating rights and property of the latter into the former for ownership, management, and operation. In the same application, Clifford J. O. Nelson, of Dover, Mass., and his half brother, Charles G. Chilberg, of Rockville, Conn., who control Nelson through equal ownership of 91.5 percent of its outstanding capital stock, seek authority under the same section to acquire concurrent control of Gilbertville's operating rights and property through the transaction. Nelson and Gilbertville operate more than 20 motor vehicles.

In No. MC-F-6178, the Commission, division 4, on its own motion, by order entered December 20, 1955, instituted an investigation under section 5(7) of the Interstate Commerce Act to determine whether control or management

of Gilbertville in a common interest with Nelson may have been effectuated and may be continuing in violation of section 5(4) of the act. Gilbertville, Nelson, Clifford J. O. Nelson, Charles G. Chilberg, Greta C. Carlson, a sister, and Kenneth A. H. Nelson, a brother, were made respondents.

[fol. 100] A hearing of the two proceedings on a consolidated record has been held, at which 13 motor common carriers and rail carriers in eastern territory opposed the application and appeared as interested parties in the investigation. The applicants-respondents, the motor carrier protestants, and the Bureau introduced evidence. Briefs were filed by the applicants-respondents, the Bureau, and by all but the last six named motor carrier protestants. No exceptions are taken by the parties to the factual statements in the examiner's report, and they are adopted as our own without being restated, except to the extent necessary for clarity.

Nelson and Gilbertville are motor common carriers. The former holds irregular-route rights to transport principally materials used in the manufacture of cloth, waste materials resulting therefrom, and supplies and materials used in connection therewith, between specified points in Massachusetts and specified points in New Hampshire and Rhode Island, and between certain Rhode Island and Connecticut points and an area comprising approximately the eastern two-thirds of Massachusetts, on the one hand, and, on the other, New York, N. Y., certain New Jersey points, and Philadelphia, Pa. Gilbertville holds rights to transport general commodities (1) over numerous combinations of regular routes between Lowell and Boston, Mass., and (2) over irregular routes principally (a) between points in Massachusetts, (b) between the town

² The Adley Express Company, Alvin R. Holmes, doing business as Holmes Transportation Service and/or Jones Express, Hemingway Bros. Trucking Co., M&M Transportation Company, Newburgh Transfer, Inc., P. B. Mutrie Motor Transportation, Inc., Taylor's Express Co., Jackson Transportation Corp., Lombard Bros., Inc., National Transportation Co., Downing and Perkins, Inc., H. T. Smith Express Co., and Westchester Motor Lines, Inc.

of Hardwick, Mass., on the one hand, and, on the other, New York City and points in New York and New Jersey within 20 miles thereof, and (c) between Palmer, Mass., and points within 10 miles thereof, on the one hand, and, on the other, points in Connecticut and Rhode Island. It may also transport certain specified commodities. Since about March 1953, all of Gilbertville's outstanding stock has been owned by Kenneth Nelson, or persons closely identified with him or with Nelson.

Under the transaction in No. MC-F-6090, Nelson would acquire all of Gilbertville's outstanding stock, exchanging therefor shares of its own stock having an aggregate net book value equal to the aggregate net book value of Gilbertville's stock as of the date of consummation. Nelson would then take over all the assets and assume all the liabilities of Gilbertville and surrender its charter for cancellation. Had the transaction been effected July 31, 1956, Kenneth Nelson would have received 78 shares of Nelson's stock in the exchange.

Although finding that the respondents had effectuated and were continuing the control or management of Gilbertville in a common interest with Nelson in violation of section 5(4), the examiner further found that the proposed stock acquisition by Nelson, to be followed by the merger, would be consistent with the public interest, provided that the usual condition respecting amortization were imposed, and provided that the cancellation of certain unexercised [fol. 102] authority of Gilbertville coincidentally with consummation were required. As to the unlawful common control, he expressed the view that the facts developed of record placed that question on the "borderline" but that, notwithstanding no single act, practice, or arrangement between the applicants-respondents established such unlawful control, the cumulative effect of the closely related factors, and the circumstances surrounding them, require such a finding. He concluded, however, that the evidence did not establish that the violations shown and the circumstances under which they occurred were the result of a persistent disregard for regulation, but stemmed from ignorance and carelessness, rather than from any wilfulness on the part of the

respondents. As to the proposed merger, he found that savings in transportation costs and improvements in service resulting therefrom were desirable in the public interest, warranting approval of the transaction.

None of the parties challenges the examiner's findings of unlawful control, the applicants-respondents only comment thereon in their exceptions being that they are perplexed by his findings in this regard. However, in order to preserve their rights as provided under Rule 1.87 of the General Rules of Practice, herein called the Rules, applicants-respondents in their exceptions renew their objections to rulings by the presiding examiner at the hearing which they describe as follows: (1) in directing that the hearing in No. MC-F-6099 go forward first, (2) in permitting the opposition under the guise of cross-examining applicants' witnesses therein to propound questions to bolster their position in the investigation proceeding, (3) [fol. 103] in permitting certain testimony of a hearsay nature to be made a part of the record, (4) in prohibiting respondent's counsel from cross-examining certain witnesses respecting regulations of this Commission, and the law applicable to the matters alleged to have been unlawful, (5) in permitting an examination on and the introduction in evidence of a certain undated teletype message, and (6) in failing to accept certain financial data tendered. Under Rule 1.74 of the Rules, the presiding officer has the option of determining whether on a consolidated record an application or investigation proceeding is to be heard first, and, in our opinion, his ruling here did not prejudice the parties. We have examined the facts pertinent to the other contentions and the examiner's rulings thereon and find that, except with respect to the teletype message, discussed later, the contentions of applicants-respondents are not justified.

In our opinion, the examiner should not have received in evidence as an exhibit copy of the teletype message, or authorized the taking of testimony in regard thereto, over the applicants-respondents over objection. The message is undated, the sender and receiver and the location of the sending and receiving points are not identified, the message itself is incoherent and incomplete, and there is no

evidence showing that the directives therein were actually put into effect. We accordingly have disregarded the aforesaid exhibit and testimony relating thereto in the disposition of these proceedings.

[fol. 104] Among Gilbertville's operating rights directed to be canceled by the examiner should the merger be consummated are those authorizing the transportation of sanitary napkins, facial tissues and paper boxes, over a regular route between New York City and Wilmington, Del., over U. S. Highways 1 and 13, serving the intermediate point of Philadelphia and the off-route point of Rockland, Del. Applicants urge that these operating rights also be authorized to be retained by Nelson, contending that the Commission in granting these and similar rights (irregular-route general-commodity rights between the town of Hardwick and New York City), recognized that the shippers of such products were entitled to a complete service, and that Gilbertville has performed the service, several Wheelwright, Mass.-Philadelphia shipments having been shown to have moved by its line as far south as New York City and there interchanged, and one through shipment having been moved by it in the reverse direction from Rockland to Wheelwright. They do not object to the other cancellations proposed by the examiner. In their petition accompanying their exceptions, applicants request waiver of Rule 1.86 of the Rules in order to incorporate as part of the record an accompanying list of shipments of napkins and tissue represented as having been handled by Gilbertville under the above rights at various times between June 15, 1956, and May 29, 1957, both inclusive. Protestants object to the introduction of this additional information at this late date, certain rail protestants contending that under the above Rule arrangements for such supplementation of the record should have been made before the close [fol. 105] of the hearing. Rule 1.86 provides, in part, that, except as directed by the presiding officer at the hearing, or as expressly permitted in particular instances, the Commission will not receive in evidence or consider as part of the record any documents submitted for consideration after the close of the hearing. As pointed out by certain motor protestants, all the shipments in the list moved long after the instant application was filed, in fact only 10 before the

close of the hearing. In view of the above, and protestants' objections to the receipt of the additional information at this late date, applicants' petition is denied. In view of our conclusions, it is unnecessary to consider further applicants' contention in respect of the regular-route special-commodity rights just described.

Protestants and the Bureau except to the examiner's findings that the section-5 application should be approved, contending that instead it should be denied because of the unfitness of the parties. They argue that he erred in finding that the violations do not establish a persistent disregard for regulation, but have been the result of ignorance and carelessness and not wilfulness; in excusing the violations on the grounds of youth and inexperience; in concluding that a finding of unfitness by reason of the violations was not warranted; and, finally, in failing to recommend a divestiture in view of the findings that section 5(4) had been and is being violated. The protestant carriers also argue that the examiner erred in failing to find that the transaction as proposed would adversely affect existing carriers. As to the violations, protestants and the Bureau assert that, although young in years, the Nelson and Gilbertville officers are old in experience, and [fol. 106] that to approve the control and merger would be tantamount to issuing an invitation to carriers that all they have to do is consummate with the assurance that a liberal Commission will bless their *coup d'etat*. They urge that the examiner has failed to appreciate that a new pattern of operations built upon a prior unlawful assumption of control is entitled to no more consideration than dormant operations, and, as to his conclusion that the competition feared by protestants is either already an accomplished fact or capable of becoming so regardless of whether the transaction is approved, protestants maintain this would be a good argument and entitled to consideration if based on a legitimate competitive evolution, which is not the case here. They also state that another reason for denial is the difficulty of policing the unified operations, both from the standpoint of seeing that appropriate gateways are used and only lawfully authorized traffic is transported, which difficulties they urge outweigh any possible

public benefits, indeed the present textile products handled direct by Nelson might be delayed by reason of their being comingled in the same equipment with Gilbertville's other authorized commodities which require routings through circuitous gateways.

In their reply, applicants-respondents assert that none of the exceptants questions Nelson's financial fitness, and that both it and Gilbertville have excellent safety records. They urge that the leasing by Gilbertville of certain of Nelson's equipment and terminal facilities, the part-time employment by each of the same drivers within the same pay period, the maintenance of duplicate medical certificates for drivers in the files of each carrier, the billing by Nelson [fol. 107] of all shipments interlined with Gilbertville, and the finding of relatively few Gilbertville shipments moving with Nelson's shipments on the latter's trailers do not provide a sufficient basis for finding that the applicants are unfit. They state that numerous carriers have been found to be fit, notwithstanding they lease equipment, use common terminals and employ some of the same personnel, such as drivers and accountants; that some of the drivers here are also hired part-time by other carriers, which, with the keeping of duplicate medical certificates, is generally a recognized practice in the industry; that there is no regulation prescribing which carrier actually must prepare the billing for shipments; and as to certain of Gilbertville's traffic alleged to have been comingled with Nelson's traffic, attention is called by the parties to the fact that one shipment involved an intrastate movement, and as to certain other traffic it is impossible to determine from the record whether such shipment was being actually used in the textile industry, but, if so, Nelson could have handled the shipment under its own rights. They contend that as to the one incident where a teletype message was destroyed, it is obvious that the Commission representative was convinced that the person guilty of the act was not then familiar with Commission regulations requiring their preservation, thus supporting the examiner's finding that the act of destruction was not wilful. They argue that when considering the substantial volume of traffic handled by Nelson and Gilbertville, the many carriers with which each interlines,

and the keen competition among the carriers in the New [fol. 108] England area, it is inconceivable that any substantial deviation from this Commission's regulations would escape the attention of competitors and would remain unreported. They assert that it is significant here that not one protestant has offered evidence of its own concerning a violation. Respecting the resulting circuitous operations, applicants-respondents state that protestants have completely overlooked the fact that the slight increase in operating expenses by operating circuitously (estimated by counsel to be approximately 28 miles longer via the Hardwick gateway than via the shortest route between Boston and New York City), would be more than offset by the increased revenues from operating loaded trailers instead of the partial loads of textile products now transported by Nelson. They state that the examiner recognized that an approval and consummation of the transaction as proposed under section 5 would terminate the practices which have been found objectionable, and that, should this Commission conclude to deny the application, there would be no necessity for the entry of a cease and desist order as applicants-respondents have taken and will voluntarily take corrective action to eliminate the objectionable practices and conditions. Finally, they urge that protestants have taken no exceptions to the examiner's findings that no particular loss of traffic by protestants has been shown as a result of the applicants-respondents operations, and that the economies and improvements in service resulting from the unification as found by the examiner based on the evidence, clearly meet the requirements of the law and warrant his ultimate finding that the transaction would be consistent with the public interest.

[fol. 109] As previously stated, no party of record excepts to the examiner's findings that the respondents have effectuated or participated in the effectuation of the control and management of Nelson in a common interest with Gilbertville in violation of section 5(4), and that the violation is continuing. In view of our conclusions herein, it appears desirable to restate briefly certain of the salient facts providing the basis for that finding. The four individuals named as respondents are the children of Mrs.

Linnea Nelson, deceased, and with three other children hold an equal number of shares of stock in Bergson Company, a real estate holding company, herein called Bergson. Respondent Kenneth Nelson's connection with Nelson as an officer, director and stockholder was terminated in September 1951, when he sold his 50 shares of its stock to his brother, Clifford. An additional 42 shares of Nelson's stock which he had inherited from his mother were, pursuant to an agreement executed in September 1951, also transferred to Clifford immediately following a distribution of the estate in January 1953. Kenneth Nelson did not, however, entirely disassociate himself from Nelson in 1951 following the above stock sale. He continued to have an office at its Connecticut headquarters, and, during 1952, before his purchase of Gilbertville's stock, received a salary of \$15,650 from Nelson as its "free lance" tariff consultant. Such employment continued in 1953 even after he had acquired Gilbertville's stock on March 1, 1953, and resulted in the payment of a salary to him by Nelson aggregating \$13,829.

Bergson's properties include three terminals, one being Nelson's Connecticut headquarters and leased to it. Nelson [fol. 110] in turn sublets space therein to Gilbertville. Another independently owned terminal located at New York City, is used by Nelson, Gilbertville, R. A. Byrnes, Incorporated, a motor carrier which is controlled through stock ownership by Clifford Nelson and Charles Chilberg, and by another carrier. Nelson and Gilbertville have the same telephone numbers at seven locations connected by leased interterminal lines, the total rental payments being initially borne by Nelson which is then partially reimbursed by Gilbertville.

Gilbertville regularly leases motor vehicles from Nelson, and at its own Gilbertville terminal and the shared terminal in Connecticut maintains lists of Nelson-owned equipment and prepared lease forms to facilitate the leasing of equipment. At the same point it has a complete file of driver's certificates for all Nelson's drivers. On a number of occasions the same driver has been employed by both Nelson and Gilbertville during the same pay period. If Nelson or Gilbertville is handling a shipment destined to a point on

the lines of the other, it has been the practice in the past for a vehicle to be leased to the destination carrier by the origin carrier and to use the same driver to move the equipment through.

Nelson and Gilbertville have given favorable consideration to each other concerning intercompany accounts, Gilbertville receiving such consideration respecting equipment rentals owed Nelson, the Nelson respecting interline settlements due Gilbertville. At least 25 percent of the repairs on Gilbertville's motor vehicles have been made in Nelson's shop at the Connecticut terminal, where it also has prepared all billing on the shipments interlined with Gilbertville, whether the shipment was prepaid or collect and irrespective as to which carrier originated the shipment. Although Nelson and Gilbertville interline traffic with numerous other carriers as well as with each other, where they provide the service jointly the division of the revenue remains constant regardless of the length of the haul, whereas, customarily, such divisions between carriers are on a mileage pro rata basis.

Aside from the question as to whether the above constitutes unlawful common control, Gilbertville or Nelson have on various occasions violated the provisions of section 206 and certain regulations promulgated under part II of the act, including the performance of transportation service beyond the scope of their operating authorities, failing to observe proper gateways for traffic interchange, destroying records, and failing to have certain safety equipment on motor equipment, or failing to maintain same in safe operating condition.

We concur in the examiner's conclusion that Nelson and Gilbertville are controlled or managed in a common interest in violation of section 5(4), our finding in this respect not being based on any single factor or several selected from the whole, but on the entire chain of circumstances revealed by the record. Having so found, the question for determination is whether we nevertheless should approve the transaction as proposed under section 5, the consummation of which would automatically terminate such violation for the future. Closely associated with the above, is the question [fol. 112] as to whether, in view of the violation, Nelson

would be a fit person to conduct the unified operations. We have on numerous prior occasions approved transactions involving partial or complete consummation where we have been able to find that such act, although unlawful, had not been deliberately effectuated and the transaction otherwise would be consistent with the public interest. Clearly, however, action adverse to the interest of the applicants can be taken, based on a finding of a violation of section 5(4). This was done recently in *Smithsons Holdings—Control—Ontario Frt. Lines Corp.*, 70 M.C.C. 623, decided August 13, 1957. Also, as the acquiring party applicant's fitness, financial and otherwise, is an issue in a section 5(2) proceeding, the authority sought may be withheld, if the circumstances warrant, based on other violations. See *Powell—Purchase—Rampy*, 57 M.C.C. 597. It should also be observed that the act clearly intends that our consideration be given to "proposed" transactions under section 5. *Congdon—Purchase—Wadkins*, 50 M.C.C. 781. By premature consummation, viz., effecting, as here, the unlawful control and management in a common interest, we are impeded in the discharge of our statutory duty to consider the entire transaction in all its aspects. *Texas, New Mexico & Oklahoma Coaches, Inc.—Pur.—Aaron*, 55 M.C.C. 269.

When regulation of motor carrier transportation under the act was in its earlier stages, there were many instances when transactions under section 5 were approved, notwithstanding a showing of law violation, because the paramount public interest warranted approval. Now, after more [fol. 113] than 20 years of regulatory experience, a more stringent approach is warranted, not as a penalty to these particular respondents, but in recognition that a violation of the law should not be rewarded, and that existing carriers endeavoring faithfully to comply with the law should be encouraged and protected. It should be emphasized that Nelson's and Gilbertville's principals are not new to transportation, or to section-5 proceedings. Charles Chilberg has been associated with Nelson or its predecessor since 1930. He and his half-brother Clifford Nelson have been parties in other section-5 proceedings. See *L. Nelson & Sons Transp. Co.—Purchase—White's Exp.*, 59 M.C.C. 675.

and No. MC-F-5749, *Charles G. Chilberg and Clifford J. O. Nelson—Control—R. A. Byrnes, Incorporated*, — M.C.C. —, decided May 15, 1956. Kenneth Nelson, Gilbertville's principal stockholder, was associated with Nelson as long ago as 1948, and by the evidence herein has indicated that he is familiar with the obligations imposed on carriers under the act and prior decisions by the care with which he has been instructing Gilbertville's drivers in the use of specific gateway points when performing through operations under separately described portions of its authority. Considering all the circumstances, we are of the opinion that the violations of the law and of the regulations should not be "blessed" by approval in No. MC-F-6099, but rather, that respondents should be directed to terminate the unlawful control and management in a common interest. They will also be expected to cease the other violations. In view of our conclusions, it is unnecessary to consider other contentions of the parties.

[fol. 114] We find, in No. MC-F-6099, that the transaction has not been shown to be consistent with the public interest, and that the application accordingly should be denied.

We further find, in No. MC-F-6178, that the control and management of The L. Nelson & Sons Transportation Co., in a common interest with Gilbertville Trucking Co., Inc., has been effectuated and is continuing in violation of section 5(4) of the Interstate Commerce Act, and that the respondents The L. Nelson & Sons Transportation Co., Gilbertville Trucking Co., Inc., Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson, and Kenneth A. H. Nelson, have participated in the effectuation of such control and management in a common interest, and that said respondents are participating in its continuance.

An appropriate order, which will deny the application and require the respondents named above to terminate the violation of section 5(4) of the act, will be entered.

COMMISSIONER WINCHELL dissents.

[fol. 115]

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 26th day of February, A. D. 1958.

No. MC-F-6099

THE L. NELSON & SONS TRANSPORTATION CO.—
CONTROL AND MERGER—
GILBERTVILLE TRUCKING CO., INC.

No. MC-F-6178

THE L. NELSON & SONS TRANSPORTATION CO.—
INVESTIGATION OF CONTROL—
GILBERTVILLE TRUCKING CO., INC.

Investigation of the matters and things involved in these proceedings having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report and the report of the examiner are hereby made a part hereof:

It is ordered. That the application in No. MC-F-6099 be, and it is hereby, denied.

It is further ordered. That in No. MC-F-6178, respondents The L. Nelson & Sons Transportation Co., and Gilbertville Trucking Co., Inc., both corporations, and Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson and Kenneth A. H. Nelson, individuals, and each of them, be, and they are hereby, required to terminate the violation of the provisions of section 5(4) of the Interstate Commerce Act, found in the said report to have been accomplished and to be continuing through the control or management of The L. Nelson & Sons Transportation Co., of Ellington, Conn., in a common interest with Gilbertville Trucking Co., Inc., of Gilbertville, Mass.

And it is further ordered. That The L. Nelson & Sons Transportation Co., and Gilbertville Trucking Co., Inc., both corporations, and Charles G. Chilberg, Clifford J. O. Nelson,

Greta C. Carlson, and Kenneth A. H. Nelson, individuals, shall report to this Commission, within 60 days from the date hereof, the steps taken by each of them to comply with the requirements of this order with respect to termination of the said violation of section 5(4) of the act.

By the Commission, division 4.

HAROLD D. MCCOY,
Secretary.

(SEAL)

[fol. 116]

APPENDIX "G" TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 2nd day of October, A. D. 1958.

No. MC-F-6099

THE L. NELSON & SONS TRANSPORTATION CO.—
CONTROL AND MERGER—
GILBERTVILLE TRUCKING CO., INC.

No. MC-F-6178

THE L. NELSON & SONS TRANSPORTATION CO.—
INVESTIGATION OF CONTROL—
GILBERTVILLE TRUCKING CO., INC.

Upon further consideration of the record in the above-entitled proceeding, and of

- (1) Petition of applicants-respondents, filed April 1, 1958, for reconsideration of the report and order of February 26, 1958, by Division 4, and for oral argument;
- (2) Joint replies, filed on and after April 21, 1958, to said petition (a) by The Adley Express Company, M. & M. Transportation Company, and Hemingway Brothers Interstate Trucking Company, (b) Downing & Perkins, H. T. Smith Express Company, Lom-

bard Bros., Inc., and National Transportation Company, (c) P. B. Mutrie Motor Transportation, Inc., Alvin R. Holmes, doing business as Holmes Transportation Service and/or Jones Express, Newburgh Transfer, Inc., and Taylor's Express Co., and (d) by the Bureau of Inquiry and Compliance, Interstate Commerce Commission.

- (3) Motion of rail carriers in eastern territory to strike petition of applicants-respondents, filed April 22, 1958,
- (4) Separate motions, filed on and after May 5, 1958, to strike replies of (a) P. B. Mutrie Motor Transportation, Inc., et al., (b) Downing & Perkins, et al., and (c) the Bureau of Inquiry and Compliance,
- (5) Reply of applicants-respondents to motion of rail carriers in eastern territory to strike, filed May 5, 1958, and
- (6) Reply of Bureau of Inquiry and Compliance to motion to strike by applicants-respondents, filed May 23, 1958;

and good cause therefor appearing:

It is ordered, That the proceedings be, and they are hereby, reopened for reconsideration on the present record.

By the Commission, division 4.

HAROLD D. MCCOY,
Secretary.

(SEAL)

[fol. 117]

APPENDIX "H" TO COMPLAINT

ORDER

INTERSTATE COMMERCE COMMISSION

No. MC-F-6099

THE L. NELSON & SONS TRANSPORTATION CO.

(Ellington, Conn.)—

CONTROL AND MERGER—

GILBERTVILLE TRUCKING CO., INC.

(Gilbertville, Mass.)

No. MC-F-6178

THE L. NELSON & SONS TRANSPORTATION CO.—

INVESTIGATION OF CONTROL—

GILBERTVILLE TRUCKING CO., INC.

No. MC-42871 (Sub-No. 3)

THE L. NELSON & SONS

TRANSPORTATION COMPANY

In the matter of postponement of the effective date.

PRESENT: John H. Winchell, Chairman, to whom the matter which is the subject of this order has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceedings, and of a request dated July 15, 1960, on behalf of applicants-respondents for a postponement of the effectiveness of the orders of June 9, 1959, February 15, 1960, and July 5, 1960, to allow time for filing of a complaint in the Federal District Court; and good cause therefor appearing:

It is ordered, That the effective dates of the orders entered in said proceeding on June 9, 1959, February 15, 1960, and July 5, 1960, be, and they are hereby postponed to August 15, 1960.

Dated at Washington, D. C., this 18th day of July, A. D. 1960.

By the Commission, Chairman Winchell.

HAROLD D. MCCOY,
Secretary.

(SEAL)

[fol. 120]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS.

Civil Action No. 60-562-S

GILBERTVILLE TRUCKING CO., INC., THE L. NELSON & SONS
TRANSPORTATION COMPANY, CHARLES G. CHILBERG, CLIF-
FORD J. O. NELSON, GRETA C. CARLSON, and KENNETH A.
H. NELSON, Plaintiffs,

—v.—

THE UNITED STATES OF AMERICA, Defendant,

and

INTERSTATE COMMERCE COMMISSION,

Intervening Defendant.

JOINT ANSWER OF THE UNITED STATES OF AMERICA

AND THE INTERSTATE COMMERCE COMMISSION—

Filed October 13, 1960

The United States of America, defendant, and the Inter-
state Commerce Commission, intervening defendant (the
latter hereinafter called "the Commission"), answer the
complaint of the plaintiffs as follows:

I.

Admit the allegations in Paragraph 1, except the citation
in the seventh line of said paragraph. The correct citation
is 80 M.C.C. 257.

[fol. 121]

II.

Admit the allegations in Paragraphs 2, 3, 4, 5, 6, 7, 8, and 9.

III.

Admit that the allegations in Paragraphs 10, 11, and 12 are true in general, but refer the Court to the certificates No. MC-87431 and MC-42871, Sub 3, both of record in the Commission's proceedings under review, for the details of the operating authorities of Gilbertville Trucking Co., Inc., and of The L. Nelson and Sons Transportation Company, respectively, and for the details as to whether the operating authorities of Nelson and Gilbertville are competitive to any material extent.

IV.

Admit the allegations in Paragraphs 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28.

V.

Admit the allegations in Paragraph 29, and allege that following the filing in Court of the complaint on August 5, 1960, the Commission, by order of August 11, 1960, further extended the effective date of the order of June 9, 1959 (Appendix "B" to the Complaint) until the further order of the Commission. A true copy of that order of August 11, 1960, is attached hereto and made a part of this Answer as Exhibit "A".

VI.

Deny the allegations in Paragraphs 30, 31, and 32.

VII.

Admit the allegation in Paragraph 33.

[fol. 122]

VIII.

For further answer to the complaint, these defendants allege that all of the parties to the proceedings before the

Commission in Dockets Nos. MC-F-6099 and MC-F-6178 were given a full and complete hearing; that the findings and conclusions of the Commission in the reports and orders attacked in the complaint were and are fully supported and justified by the evidence submitted in said proceeding; that in issuing the reports and orders attacked in the complaint, the Commission considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition required by law to be considered, and weighed as well each fact, circumstance and condition called to its attention by the parties to said proceedings by their respective counsel or otherwise, including the plaintiffs; that said reports and orders were not made or entered unreasonably, arbitrarily, capriciously, or in abuse of its discretion; that in issuing said reports and orders, the Commission did not exceed the authority conferred upon it by law; and, except as expressly admitted in this answer, the defendants deny each and every allegation contained in the complaint.

Wherefore, having fully answered, the United States of America, defendant, and the Interstate Commerce Commission, intervening defendant, pray that the relief sought in the complaint be denied, that the complaint be dismissed, [fol. 123] and that judgment be entered for the defendants, with costs against the plaintiffs.

Robert A. Bicks, Assistant Attorney General; John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.; Elliot L. Richardson, United States Attorney, Federal Bldg., Boston, 9, Massachusetts, Attorneys for the United States of America.

Robert W. Ginnane, General Counsel; James Y. Piper, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Interstate Commerce Commission.

[fol. 124]

EXHIBIT "A" TO JOINT ANSWER

~~ORDER~~

INTERSTATE COMMERCE COMMISSION

No. MC-F-6099

THE L. NELSON & SONS TRANSPORTATION CO.

(Ellington, Conn.)—

CONTROL AND MERGER—

GILBERTVILLE TRUCKING CO., INC.

(Gilbertville Mass.)

No. MC-F-6178

THE L. NELSON & SONS TRANSPORTATION CO.

INVESTIGATION OF CONTROL—

GILBERTVILLE TRUCKING CO., INC.

In the matter of further postponement of the effective date of orders.

PRESENT: John H. Winchell, Chairman, to whom the matter which is the subject of this order has been assigned for action thereon.

Upon consideration of the record in the above entitled proceedings, and of a petition dated August 5, 1960, on behalf of certain of the applicants-respondents for further postponement of the effective dates of the orders entered in these proceedings on June 9, 1959, February 15, 1960, and July 5, 1960, as last postponed to become effective on August 15, 1960 by order of July 18, 1960, by reason of the pendency of a complaint filed on August 5, 1960 by the applicants-respondents in the United States District Court for the District of Massachusetts in *Gilbertville Trucking Co., Inc., et al. v. United States*, Civil Action No. 60-562-S, to review the first three of the above-mentioned orders; and good cause therefor appearing:

It is ordered, That the order of July 18, 1960 be, and it is hereby vacated and set aside.

And it is further ordered, That the effective dates of the orders entered in said proceedings on June 9, 1959,

February 15, 1960, and July 5, 1960, be, and they are hereby, further postponed until further order of the Commission.

Dated at Washington, D. C., this 11th day of August, A.D. 1960.

By the Commission, Chairman Winchell.

HAROLD D. MCCOY
Secretary

(SEAL)

[fol. 125] Certificate of Service (omitted in printing).

[fol. 255]

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 60-562-S

Woodbury, J., Chief Circuit Judge; Sweeney, J.,
Chief District Judge; Wyzanski, J., District
Judge.

GILBERTVILLE TRUCKING COMPANY, INC., et al.,

v.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION.

Stenographic Record of May 10, 1961

APPEARANCES.

Henry E. Foley, Esq., Lloyd M. Starrett, Esq., Mary E. Kelley, Esq., for the Plaintiffs.

James Y. Piper, Esq., James W. Noonan, Esq., for the Defendants.

Court Room No. 1,
Federal Bldg., Boston Mass.

Wednesday, May 10, 1961.

[fol. 256]

OFFERS IN EVIDENCE

Mr. Starrett. May it please the Court, there are various items of evidence essentially in the record before the Commission in this case. We offer the application under Section 52 and the order initiating the investigation.

We offer the order setting the matter for hearing before an Examiner, and certified in two volumes the transcript of all the testimony before the Examiner.

We offer all the exhibits that were before the Commission.

[fol. 257] We offer the exceptions to the Examiner's report, the petition for reconsideration and the order of the Commission by Division 4, the petition for reconsideration, and so forth, of the order of the Commission, and finally, a petition dated March 7, 1960.

We offer here, or either offer or furnish to the Court, for the Court's assistance in taking judicial notice of the case, the order entered by the Commission in the matter of the acquisition by Gilbertville Trucking Company of certain rights of a company doing business as Wolff's Express, which is Docket Number MC-F-57090.

May it please the Court, the majority of the orders, all of the orders that are pertinent, other than those which have just come in, and the three reports emanating from the these parts of the Commission, are all attached to the complaint and are admitted by the answer.

There is one further order, and that is the order postponing the effective date of the order of the Commission until further order of the Commission, in the light of this proceeding. That is attached as Exhibit A to the answer, and we admit that that is a true copy.

[fol. 285]

COLLOQUY BETWEEN COURT AND COUNSEL

Judge Woodbury. The title doesn't help me much. We don't know what he did. I think it is more important to know what he did than what he was called. But what is a tariff consultant? Does he just simply figure out tariffs, or does he route various shipments, or what does he do?

Mr. Piper. I don't know. The record here doesn't show. We know there is such a thing as a tariff consultant; some lawyers are called tariff consultants.

[fol. 288] Judge Wyzanski. Is there any evidence whatsoever that he acted as tariff consultant after March?

Mr. Piper. No, I can't say there is any evidence he acted as tariff consultant. So the next step in the proceeding—

Judge Woodbury. I am looking now at the report of the Commission on reconsideration at page 263.

Mr. Piper. Yes, sir.

Judge Woodbury. The last sentence in the first full paragraph on the page; (reading)

"However, from September 1, 1951 to March 1, 1953 Kenneth had an office in one of Nelson's terminals, where as a 'free-lance' tariff consultant he served only Nelson, and was paid by Nelson \$15,650 in 1952 and [fol. 289] \$13,829 in 1953".

Now, that takes him from September 1, 1951 to March 1, 1953.

Mr. Piper. That is right.

Judge Woodbury. That is what the Commission found.

Mr. Piper. That is right.

Judge Woodbury. And pursuant to that finding he wasn't a free-lance tariff consultant serving only Nelson after the time he bought the stock in Gilbertville.

Mr. Piper. The statement I made with respect to his having Nelson as his sole client involved the time he was acting as tariff consultant.

Judge Woodbury. I am not disputing you. I agreed with you there.

Mr. Piper. The record doesn't show a thing with respect to what happened after March 1, 1953.

Judge Woodbury. What I am getting at is this: there was no period of time in which his services as tariff consultant and his ownership of the Gilbertville stock overlapped; isn't that right?

Mr. Piper. I can't say that I quite agree with that, your Honor. It all depends on the interpretation you give it.

Judge Woodbury. That is the way I read it.

Mr. Piper. That's what the Commission says.

Judge Woodbury. Well, haven't we got to take what the Commission says as the fact?

[fol. 290] Mr. Piper. The Commission adopted these facts from the Division 4 report, and the Division adopted them from the Examiner's report. The underlying facts of record which I have indicated at page 19 of our brief are very simple. Your Honor just read it. I have noted here: (reading)

"Kenneth had an office at one of Nelson's terminals where as tariff consultant he served only Nelson".

transcript page 180 to 182, 269 to 274, and 422 to 427, and the Examiner's report sheet 44.

Those are the points of the record that support that statement.

Judge Woodbury. We will check it.

Mr. Piper. That is all I can express on that at this time.

[fol. 291] Judge Wyzanski. Would it not be fair to say that the term free lance means that the person holds himself out to serve clients of any kind, and free lance means that he is not an employee, he is not exclusively working for somebody, but the term means available to serve as an independent person whoever he wishes to serve?

Mr. Piper. I can agree with that, your Honor. The only point I raise is that there is nothing of record to indicate that Kenneth Nelson served any other client as tariff consultant besides L. Nelson.

Judge Wyzanski. But on whom is the burden to prove that he served only one?

[fol. 292] Mr. Piper. Who has the burden to prove that he served only one?

Judge Wyzanski. Yes.

Mr. Piper. This came out in the application proceedings, this testimony.

Judge Wyzanski. But you are trying to prove, or rather the Commission and the Examiner were concerned with

making a finding as to in whose interest the company was being operated; isn't that right?

Mr. Piper. That is right.

Judge Wyzanski. And therefore, it becomes the burden of those who seek to show that, to prove that the relationship between Nelson and any particular company is one of undivided loyalty; isn't that right?

Mr. Piper. I guess that is correct, your Honor. But from the point of view of the Commission, of Division 4 and the entire Commission, the investigators in the investigation had sustained that burden of proof.

[fol. 294] Judge Wyzanski. Excuse me. At the time he bought—there was never a period of time, was there, when he was both a tariff consultant and the owner of Gilbertville? Was there any moment?

Mr. Piper. That is why—the only answer I can give you at this time is to refer you to the excerpts from the testimony that I have indicated on page 19 with respect to that point.

[fol. 303] Judge Wyzanski. If there were not a fraternal relationship, how would the situation differ from the case in which a former lawyer, having learned through service for his client, chose to invest in a comparable enterprise to that as to which he had previously acted as counsel?

Mr. Piper. It wouldn't differ at all. Your Honor put his finger right on one of the points contended by the Commission. This was a family relationship. The Examiner so held. It was a family relationship they had been in, L. Nelson & Sons, for some years.

[fol. 307] Judge Woodbury. Is that a rare practice among carriers that are not affiliated, to share terminal space or something of that sort?

Mr. Piper. I am not saying that any one of these is enough to make this finding of—

Q Judge Woodbury. No, but that is a common practice among carriers.

[fol. 313] Mr. Foley. I am not positive that the record [fol. 314] has been admitted in evidence. Might that be clear? Has it been admitted?

Judge Woodbury. I thought it had. Didn't Mr. Starrett offer it at the beginning?

Mr. Foley. He offered it, but I don't know that the record shows that it was received by the Court.

Judge Woodbury. Well, there having been no objection, these offered exhibits are all accepted.

Mr. Piper. Are they all one exhibit, or are they going to be given a different number?

Judge Woodbury. One exhibit.

Mr. Piper. Call it Plaintiff's Exhibit A.

Judge Woodbury. I mean, there was no objection. These papers were offered by Mr. Starrett at the outset of the hearing and there was no objection heard. I don't know if you went through the formality of having them marked. But I guess they are all here.

[fol. 319]

IN UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action 60-562-S

GILBERTVILLE TRUCKING CO., INC., THE L. NELSON & SONS
TRANSPORTATION COMPANY, CHARLES G. CHILBERG, CLIF-
FORD J. O. NELSON, GRETA C. CARLSON, AND KENNETH
A. H. NELSON, Plaintiffs,

v.

THE UNITED STATES OF AMERICA; Defendant,

and

INTERSTATE COMMERCE COMMISSION, Intervening Defendant.

Before WOODBURY, Chief Judge, United States Court of
Appeals, SWENEY, Chief Judge, United States District
Court, and WYZANSKI, United States District Judge.

OPINION—July 7, 1961

WYZANSKI, D.J.

Stated briefly, and subject to later amplification, this is a case brought by two motor carriers and four individuals who complain that the I. C. C. has invalidly ordered one of the individuals to divest himself of stock he holds in one of the two carrier companies, and also has invalidly denied the application of one of the two carrier companies to merge into the other carrier company.

The suit in this Court began with a complaint filed August 8, 1960 seeking to enjoin and set aside the following orders of the I. C. C.:

(1) the order of June 9, 1959 entered in No. MC-F-6099, (in the matter of The L. Nelson & Sons Transportation Co.—Control and Merger—Gilbertville Trucking Co., Inc.), and No. MC-F-6178, (in the matter of The L. Nelson & Sons Transportation Co.—Investigation of Control—Gilbertville

Trucking Co., Inc.), [the said order being set forth in the [Tol. 320] complaint as "Appendix B"];

(2) the order of February 15, 1960, entered in the same matters, [the said order being set forth in the complaint as "Appendix C"]; and

(3) the order of July 5, 1960, entered in the aforesaid No. MC-F-6099 and No. MC-F-6178, and also in No. MC-42871 (Sub-No. 3) (in the matter of The L. Nelson & Sons Transportation Company), [the said order being set forth in the complaint as "Appendix D"].

Hereafter these will be called orders 1, 2, and 3, respectively.

Jurisdiction to hear the complaint is conferred on this Court by chapters 85, 87, 155, and 157 of the Judicial Code, 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325.

Administratively, this case began when on October 6, 1955, pursuant to § 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), The L. Nelson & Sons Transportation Company, (hereafter called Nelson Co.), and Gilbertville Trucking Co., Inc. (hereafter called Gilbertville Co.) filed with the I. C. C. an application to merge the operating rights and properties of Nelson Co. as transferee and Gilbertville Co. as transferor. This is the matter to which the I. C. C. gave the number MC-F-6099. The governing Section, § 5(2), provides as follows, so far as pertinent:

"(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through owner-

ship of their stock or otherwise; or for a person which [§ 321] is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; . . ."

"(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

"(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

Other relevant sections meriting citation here are §§ 5(4), 5(5) and 5(6), which read as follows:

"§ 5, par. (4). Control effected by other than prescribed methods. It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such [fol. 322] result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words 'control or management' shall be construed to include the power to exercise control or management. Feb. 4, 1887, c. 104, Pt. I, § 5, 24 Stat. 380; June 16, 1933, c. 91, Title II, § 202, 48 Stat. 217; Sept. 18, 1940, c. 722, Title I, § 7, 54, Stat. 905."

"§ 5, par. (5). Transactions deemed to effectuate control or management. For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to ac-

comply or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier. Feb. 4, 1887, c. 104, Pt. I, § 5, 24 Stat. 380; June 16, 1933, c. 91, Title II, § 202, 48 Stat. 217; Sept. 18, 1940, c. 722, Title I, § 7, 54 Stat. 905."

§ 5, par. (6). Affiliation with a carrier denied. For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organizations or operation, or whether established through common directors, officers, or stockholders, a voting trust, or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier. Feb. 4, 1887, c. 104, Pt. I, § 5, 24 Stat. 380; June 16, 1933, c. 91, Title II, § 202, 48 Stat. 217; Sept. 18, 1940, c. 722, Title I, § 7, 54 Stat. 905."

December 20, 1955, pursuant to § 5(7) of the Act, 49 U.S.C. § 5(7), the I. C. C., reciting that it appeared that control or management of Gilbertville Co. in a common interest with Nelson Co. may have been effectuated and

may be continuing in violation of § 5(4) of the Act, 49 U.S.C. § 5(4), ordered an investigation on the Commission's [fol. 323] own motion. This is the matter to which the I. C. C. gave the number MC-F-6178. The relevant statutory section, § 5(7) reads as follows:

"Investigation by Commission of effectuation of control by nonprescribed methods. The Commission is authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4) of this section. If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2)-(12) of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter, shall apply to such a violation by any other person. Feb. 4, 1887, c. 104, Pt. I, § 5, 24 Stat. 380; June 16, 1933, c. 91, Title II, § 202, 48 Stat. 217; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 7, 54 Stat. 905."

December 20, 1955, the I. C. C. assigned both matters for concurrent hearing on a joint record.

August 16, 1955 the I. C. C. referred these matters to Examiner Baumgartner for hearing on September 17, 1956. September 17 through September 26, 1956, Examiner Baumgartner held the hearing. He served his report June 8, 1957. July 8, 1957 the applicant's filed exceptions to the report. The exceptions being disallowed, the I. C. C., by Division 4, on February 26, 1958 entered a report and an order reciting that "Gilbertville [Co.] or Nelson [Co.] have on various occasions violated the provisions of Section 206, and certain regulations promulgated under Part II of the

Act", and that "Nelson [Co.] and Gilbertville [Co.] are controlled or managed in a common interest in violation of Section 5(4)", and ordering that Nelson Co. and Gilbertville Co. and four individuals, Chilberg, Clifford J. O. Nelson, Greta C. Carlson, and Kenneth A. H. Nelson cease violations of § 5(4) of the Act, and denying the companies' application to merge.

April 1, 1958 the applicants filed with the I. C. C. a petition for reconsideration of, and to set aside, the February 28, 1958 order of the Commission by Division 4.

October 2, 1958, Division 4 re-opened the proceedings. [fol. 324] June 9, 1959 the full Commission entered a report and order. The full Commission recited that it had recalled the proceedings from Division 4 for consideration and determination. Simultaneously the I. C. C. found that Kenneth Nelson had acquired control of Gilbertville Co. about March 2, 1953 in violation of § 5(4) of the Act, and pursuant to the alleged authority of § 5(7) of the Act, ordered him to divest himself of his stock interest in Gilbertville. This is Order 1 under review in this Court.

August 17, 1959 both companies filed with the I. C. C. a petition for reconsideration. February 15, 1960 the I. C. C. denied the petition and made effective the earlier order of June 9, 1959. This February 15, 1960 denial and order constitute Order 2 under review in this Court.

March 7, 1960 Nelson Co. petitioned the I. C. C. for cancellation of all its outstanding certificates of convenience and necessity, coincident with the vacation of the I. C. C. orders of June 9, 1959 and February 15, 1960. March 11, 1960 the I. C. C. temporarily stayed the effectiveness of its orders of June 9, 1959 and February 15, 1960. Then July 5, 1960 the I. C. C. denied the petition of March 7, 1960, vacated the stay order of March 11, 1960, and reinstated its orders of June 9, 1959 and February 15, 1960. This cumulative disposition of July 5, 1960 is Order 3 under review in this Court.

Having portrayed the skeleton of the administrative proceedings before the I. C. C., and before examining in detail the factual record, we may notice the general nature of the principal questions which it presents.

(1) Is the order of June 9, 1959 invalid because it is not supported by findings which in form comply with the provisions of the Administrative Procedure Act or with general [fol. 325] principles governing I. C. C. procedure?

(2) Is the order of June 9, 1959 invalid because, even if the findings are proper in form, they are not supported by substantial evidence?

(3) Is the order of June 9, 1959 invalid because, even if the findings are proper in form and in substance, they lack the specific character adequate to support an order to Kenneth A. H. Nelson to divest himself of all his stock in Gilbertville Trucking Co.?

(4) Is the order of June 9, 1959 invalid because, even if the findings are proper in form and in substance, they do not warrant an order denying the merger application?

We now turn to a more detailed examination of the record before the I. C. C. In appraising this record we repeat that the only orders here under review are orders of the full commission and that the only questions now pertinent, as stated above, fall into two divisions: first, are the full commission's orders sustained by findings, made by it, adequate in form and in substance, and second, are those orders authorized by statutory provisions.

The best way to deal with the first set of questions is to set forth in full the essential portion of the text of the I. C. C. report of June 9, 1959, with the supporting transcript references conveniently supplied by defendants in this Court. But before this is done, it will be helpful to set forth, as it were, a syllabus of their import.

The text, about to be quoted, shows a close business relationship between Kenneth A. H. Nelson, his mother, and her six other children. Originally they were all associated as shareholders in the Nelson Co. And the seven children are even now associated as equal owners of The Bergson Company. In 1952 Kenneth was still the owner of 92 of the 500 shares of the Nelson Co. He was in that year paid [fol. 326] \$15,650 as a "tariff consultant." The nature of this relationship and of this work is not precisely shown. Kenneth claims he held himself out not as an employee or

officer but as an independent contractor; yet if he had clients other than Nelson Co. they were not shown. Moreover, in his work for Nelson his duties (properly inferable from his title, his rate of compensation, and miscellaneous specific minor incidents,) trench upon administrative or executive rather than strictly independent professional advisory functions.

Kenneth continued as tariff consultant during part of 1953. Samol J. Solomon, a public accountant, who had rendered Nelson Co. continuous services almost since its organization (Tr. 28), and who as a principal witness before the I. C. C. was on the stand for several days, testified that Nelson Co. paid Kenneth \$13,800 in 1953, and that some of the services for which that payment was made were performed after Kenneth's acquisition of the stock of Gilbertville Co. (Tr. 427), that is, after March 2, 1953. That date is significant because by a contract dated on that same March 2, 1953, Kenneth in cooperation with his half brother, Oscar Chilberg, and following consultation with Solomon, purchased all the shares of Gilbertville Co.

At a later date, Kenneth bought out Oscar. And the business of Gilbertville Co. continued and flourished under the direction and ownership of Kenneth.

At all times Nelson Co. and Gilbertville Co. shared the lease of a terminal at New York City. At four other terminals, owned by the previously mentioned family company, Bergson Co., Nelson Co. was a lessee, and Gilbertville Co. was a sub-lessee of Nelson Co. Telephones were shared at the terminal.

Equipment of one company is often leased to the other. Both draw upon the same group of drivers to some extent. There has been some commingling of traffic. Some items of [fol. 327] expense are shared upon a set formula, not shown to be other than arbitrary.

From these and other less significant subsidiary items, the I. C. C. purported to "affirm the findings in the prior report [of Division 4] and in the report of the examiner, that the control and management of Nelson [Co.] and Gilbertville [Co.] in a common interest has been effected and is continuing in violation of section 5(4) of the act."

This Court having supplied the foregoing "syllabus", the following quotation from the I. C. C. report of June 9, 1959, to which counsel have added in brackets the opposite transcript references, may now be set forth.

"The evidence shows that Mrs. Linnea ~~Nelson~~, with two of her seven children, Charles and Oscar Chillberg, inaugurated the business of Nelson as a partnership in 1939 [Tr., Chillberg, 480]. It was incorporated in 1947 [Tr., Solomon, 193, and Ex. A to application]. As of May 14, 1948, of the 500 shares of authorized capital stock outstanding, 300 shares were held by Mrs. Nelson and 50 shares each by Charles and Oscar, and Clifford and Kenneth Nelson [Tr., Solomon, 30-31, 194]. Mrs. Nelson died in 1950 [Tr., Solomon, 30-31, 194-95] and her stock, less 6 shares which subsequently became treasury stock, was devised 42 shares each to her seven children [Tr., Solomon, 31-32, 194, 212]. In June and September, 1951, and in January 1953, Oscar and Kenneth sold their stock (92 shares each) to Charles and Clifford, respectively, and resigned from the business [Tr., Solomon, 29-30, 32-34, 39, 195-99, 209, 211]. Since the latter date Charles and Clifford have held 226 shares each of the capital stock of Nelson [Tr., Solomon, 202, 213, 215-16, 277-78]. Kenneth and Oscar have been neither officers nor directors since 1951 [Tr., Solomon, 35-36]. However, from September 1, 1951, to March 1, 1953, Kenneth had an office at one of Nelson's terminals where as a "free lance" tariff consultant, he served only Nelson [Tr., Solomon, 180-82, 269-74, 422-27; Ex. Rept., sh. 44], and was paid by Nelson \$15,650 in 1952 [Tr., Solomon, 271-72] and \$13,829 in 1953 [Tr., Solomon, 277, 425-427].

Under a contract of March 2, 1953 [Tr., appl. Ex. 22], after consultation with his accountant and financial adviser [Tr., Solomon, 50-51, 83, 312-13], Kenneth agreed to purchase the capital stock of Gilbertville, consisting of 100 shares, for a net consideration of \$22,447 [Tr., Solomon, 67-68, 358-60], of which \$10,000 was evidenced by a promissory note signed by him and Oscar [Tr., Solomon, 67-69, 324-36, 358-61, 371, 435]. A note of

\$30,000 was secured from a bank on a note signed by the same individuals to help finance the transaction and to furnish Gilbertville with working capital [Tr., Solomon, 55-56, 322-23, 330-31, 370-72, 460-61]. Upon the transfer of that stock 51 shares were held by Kenneth, 48 by Oscar, and 1 share by Kenneth's attorney [fol. 328] [Tr., Solomon, 78-79, 160, 335-36]. In March, 1954, Oscar transferred his shares to Kenneth [Tr., Solomon, 161-62, 332-35] who, in turn, transferred 24 shares each to his wife and to the manager of their terminal at Gilbertville, apparently in name only [Tr., Solomon, 80-83, 161-63, 332-40; K. Nelson, 689-99, 719-23].

The Bergson Company, organized January, 1953, is a real estate holding company [Tr., Solomon, 420], whose 490 shares of stock are owned in equal amounts by the seven children, and they are its directors [Tr., Solomon, 172-73, 421]. Kenneth is not an officer of Bergson [Tr., Solomon, 173]. Of the five terminals utilized by Nelson in its operations, four are leased from Bergson [Tr., Solomon, 172-77, 430-32], including a terminal at Rockville-Ellington, Conn., which is also used as the headquarters of both Nelson and Gilbertville [Tr., Solomon, 148-49; K. Nelson, 699-700, 725]. The latter subleases terminal facilities from Nelson at Rockville-Ellington, Newton, Mass., and Woonsocket, R.I., owned by Bergson [Tr., Solomon, 172-77], and at New York City, owned by other parties [Tr., Solomon, 432, 447]. At a garage and repair shop maintained at Rockville-Ellington, Nelson performs about 25 percent of the repair work on the equipment of Gilbertville [Tr., Solomon, 165-66, 445-46; K. Nelson, 796-99, 824-27; Shea, 888-89, 1120-22].

At two of the terminals, owned by Bergson, at the one in New York City, and at four other points, Nelson and Gilbertville have the same telephone numbers [Tr., Chilberg, 679-80; K. Nelson, 77-78, 786]. The total cost of leased interterminal telephone lines is \$1,100 a month and Gilbertville pays Nelson \$400 a month as sublessee [Tr., Chilberg, 679-81, 692; K. Nelson, 785-86, 805]. Nelson occasionally leases equipment from

Gilbertville [Tr., Solomon, 168-70, 412-13; Chilberg, 484-85, 512-13], although the latter constantly and frequently leases from a pool of equipment maintained by Nelson [Tr., Solomon, 170; Chilberg, 524, 543-46; K. Nelson, 702-13, 819, Shea, 835-37, 844-46, 870; La Cour, 1023, 1029-31]. Both draw upon the same group of drivers [Tr., K. Nelson, 814-19; Shea, 853-54, 883; La Cour, 1005-09] and information relative thereto, including medical certificates, are maintained in the files of both companies [Tr., K. Nelson, 728-29, 814-16]. To the extent they interline [Tr., Chilberg, 495-99, 508; K. Nelson, 738-41], revenues are divided on a fixed percentage basis [Tr., Chilberg, 524-26, 691-92; K. Nelson, 707-09, 741-43; La Cour, 1018-20], and Nelson does all of the billing for such traffic [Tr., Chilberg, 526-28; Shea, 854-59]. Frequently the same driver will be employed by both companies during the same pay period [Tr., K. Nelson, 814-20; Shea, 854, 883; La Cour, 1005-09], and on those occasions where a shipment moves from a point in the territory of one to a point in the territory of the other the same driver and vehicle will perform the through movement [Tr., K. Nelson, 782-83, 807-08; Shea, 1120-22], under prearranged base arrangements [Tr., K. Nelson, 762-69, 813-14; Shea 845-47, 1120-22]. The two companies use the same source for accounting and financial advice [Tr., Solomon, 27-28, 83, 144, 189-91, 348, 440-41], each operates to some extent, at least, under managerial direction from officers of the other [Tr., Shea, 847-53, 860-61; La Cour, 1015-16], and they are liberal with each other in the settlement of intercompany accounts [Tr., La- [fol. 329] Cour, 1021-22, 1028-29]. There has also been a commingling of traffic of the two carriers in the same vehicles whenever it suits their convenience [Tr., Shea, 901-915, 916-22, Com. Ex. 29; 925-932, Com. Ex. 30; 932-36, Com. Ex. 31; 936-40, Com. Ex. 32; La Cour, 1040-50, Com. Ex. 34].

As of March, 1953, Gilbertville had one truck, three tractors, and four trailers [Tr., Solomon, 69-70, and Appl. Ex. 22], and had a deficit in surplus of \$39,868 [Tr., Solomon, 90]. As of December 31, 1953, however,

it had a net worth of \$18,935 [Id]. In 1953 Gilbertville's revenues were \$75,489 [Ex. B-6(3) to application], whereas for the first seven months of 1956 they had increased to \$444,777 [Appl. Ex. 8]. Its equipment increased substantially during that period [Tr., Solomon, 233-38, 245-48, 408, Appl. Ex. 23; K. Nelson, 702-95, Appl. Ex. 25]. In 1953 the revenues of Nelson were \$895,774 [Ex. A-7(3) to application] and for the first seven months of 1956 they were \$630,607 [Appl. Ex. 4]. Under an authority granted by this Commission, Gilbertville, on June 16, 1954, acquired the operating rights of one Louis Marner, doing business as Wolff's Express [Tr., Solomon, 234-35, 389, Ex. B to application, Sh. 6]. In April or May of 1954, Charles Chilberg and Clifford Nelson negotiated for the capital stock of R. A. Byrnes, Incorporated [Tr., Solomon, 386-90], herein called Byrnes, and upon approval of this Commission [on May 15, 1956, Division 4 report, 75 M.C.C. 45, at 54; Appendix "F" to complaint, Sh. 16], the transaction was consummated August 21, 1956 [Tr., Solomon, 389-90, 394-95]. The general-commodity authority of Byrnes [Ex. A to application, Sh. 1] complements that of Gilbertville [Ex. B to Application, Shs. 4 and 5], and by interchange a through service on general commodities can be provided between points in Massachusetts, Rhode Island, and Connecticut, on the one hand, and, on the other, points south thereof to the District of Columbia. Considering all the facts of record, we are of the opinion, and find, that Kenneth Nelson was affiliated with Nelson within the meaning of section 5(6) at the time he purchased the stock of Gilbertville, and that the conclusive presumption of section 5(5) applies; we affirm the findings in the prior report, and in the report of the examiner, that the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing in violation of section 5(4) of the act."

Complainant's initial objection is that the language just quoted and other like passages do not constitute the sort of findings required by § 8b of the Administrative Procedure

Act, 5 U.S.C. §1007(b), or by established principles appropriately and traditionally governing findings of fact prepared by administrative agencies.

The answer is that it is no more requisite than for agencies than for courts, acting under Rule 52 of Federal Rules of Civil Procedure, slavishly to set forth in wooden, [fol. 330] numbered, footnoted paragraphs every step in the finding process. Cf. *Minneapolis & St. Louis R. Co. v. U.S.*, 361, U.S. 173, 193-194. Some agencies, like some courts, prefer to put findings in narrative form, in the hope of redeeming judicial writing from the charge that it is arid, stilted, or, to borrow Chief Judge Cardozo's happy choice of an adjective, "agglutinative". If a fact-finder has the talent of Justice Holmes, his findings are not to be rejected because they are reminiscent of what (to adopt his three classical categories) Justice Holmes would have called a sting ray rather than a kitchen knife, or a razor blade. The purpose of findings of fact is to furnish the parties and the reviewing court with a sufficiently clear basis for understanding the premises used by the tribunal in preparing its conclusions of law, adjudications, and orders. This purpose the I. C. C. has fulfilled in the case at bar, as is demonstrated by the extended quotations set forth above. Indeed to prescribe for every fact-finder the mechanical process for which complainants plead would in all probability cause agency heads, judges, and others with like responsibility to depart further from the pungent, individualized standard of the best Anglo-American judicial writing and to delegate more than they now do to anonymous law clerks. In the name of formality, rigor, and precision, we may rob the law of that style and distinction, which both reflect personal consideration and show a mastery of the art of successful persuasion.

The I. C. C. findings are satisfactory not merely in form but in substance. The transcript references enclosed in the quotations prove that the statements of the I. C. C. are supported by evidence. Admittedly a modicum of the findings are trivial to the point of demonstrable irrelevance [fol. 331]. But if a reviewing court rejects a particular item as imponderable or inconsequential, that court need not remit the case for excision of that item and for a re-weigh-

ing of the remaining mass. When a web of fact is woven *to enclose one dominant issue of fact*, (here the issue of common control) the pulling out of a few minor strings at points of less than crucial significance does not suggest that the net fails to hold. Nor does it require a new total appraisal.

Here complainants attack the I. C. C. for its inclusion in its report of some innocent conduct, or conduct of ambiguous nature. A reasonable reviewer would not conclude that the deletion of all reference to that conduct would alter or modify the I. C. C.'s ultimate and essential finding "that the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing in violation of section 5(4) of the act."

The next issue is whether as a matter of substantive law the subsidiary findings are adequate to show that sort of "control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly," which is prescribed by § 5(4) of the Act. The comprehensive statutory outlawing indicates a fixed Congressional determination to pierce veils and search for the naked truth. We are to look for the presence of unified power, not to palter over dictionary definitions, nor even to be our own lexicographer. Looking through the veil we see far, far more than one company owned by a brother of the dominant owner of another company, or one company managed by a former professional adviser of another company. Many phases of the two business have been allowed to converge and not just kept running in parallel series. We can see as the I. C. C. could see a design not of mere cooperation but of purposeful dovetailing for a common set of ends. Indeed the whole convergence begins [fol. 332] with the purchase of shares in a second company made by an individual at a moment when he is not shown to have severed a relationship to the arterial traffic nerve of the first company. And after the purchase, the operations of the two companies are so located, so served by employees, so closely identified by common avenues of public communication and approach that the ultimate finding made by the I. C. C. and the derived legal conclusion announced by the I. C. C. are not merely reasonable but inevitable to an

unprejudiced, sophisticated mind. For this Court to reject this finding and this conclusion reached by a body informed of the transportation business and its practices, sensitive to the policy it administers under legislative delegation, would not be merely to usurp an administrative function but to displace a legislative prerogative.

The foregoing reasoning does not (despite complainants' contrary arguments,) require resort to any legislatively enacted definitions or presumptions. But it is meet to observe that the reasoning of the I. C. C. and of this Court is confirmed, and at no juncture contradicted, by the statutory definitions and presumptions. No more is necessary than to quote once more the relevant sections of the Act. Section 5(5) provides:

"For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated [fol. 333] with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier."

Section 5(6) provides:

"For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the

relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier."

And Section 1(3)(b) of the Act, 49 U.S.C. § 1(3)(b), which is applicable broadly to motor carriers as well as other carriers, provides:

"For the purposes of sections 5, 12(1), 20, 304(a) (7) 310, 320, 904(b), 910 and 913 of this title, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; June 29, 1906, c. 3591, § 1, 34 Stat. 584; June 18, 1910, c. 309, § 7, 36 Stat. 544; Feb. 28, 1920, c. 91, § 400, 41 Stat. 474; June 19, 1934, c. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 2(a), (b), 54 Stat. 899."

A penultimate issue is whether, having found that § 5(4) of the Act was violated by Kenneth's acquisition of stock in Gilbertville Co., the I. C. C. was empowered to order him to divest himself of the stock. Congress did not specify this remedy. It left the matter at large to the discretion of the I. C. C. The delegated power was conferred by § 5(7) in these words:

"Investigation by Commission of effectuation of control by nonprescribed methods. The Commission is authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4) of this section. If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, [fol. 334] to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2)-(12) of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person. Feb. 4, 1887, c. 104, Pt. I, § 5, 24 Stat. 380; June 16, 1933, c. 91, Title II, § 202, 48 Stat. 217; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 7, 54 Stat. 905."

These are words of adequate amplitude to authorize a divestiture order. *U.S. v. E. I. duPont de Nemours and Company*, Sup. Ct. of U.S., Oct. Term 1960 No. 55, May 22, 1961; *F.T.C. v. Mandel Bros.*, 359 U.S. 385, 392-393; *American Power Co. v. S.E.C.*; 329 U.S. 90, 106, 112-113, 118; *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 193-194. Indeed, when the I. C. C. has found that an offender has unlawfully acquired control of a carrier and continues to hold the acquisition, an order of divestiture has a fitness so perfect that the order not merely is obviously a suitable exercise of discretion, but needs no gloss.

The point just made also answers complainants' contention that the I. C. C. order of June 9, 1959 is defective because it is not buttressed by a preceding finding specifically setting forth the considerations which, after careful weighing, led the I. C. C. to command the disgorging. When the wrong consists in yielding to an appetite for unlawful acquisition, no tribunal is called on to write an essay on why it has given greater weight to the public

demand that the wrongdoer immediately discharge himself, than the private demand of the wrongdoer that he be allowed, absolutely or conditionally, to keep what he has swallowed. As the cases cited above show, the law is full of examples of similar complete remedies instantaneously imposed on prohibited acquisitions, no matter how much time has elapsed since the forbidden event, no matter how embarrassing the requirement of prompt action in an unfavorable market. See *U.S. v. duPont*, above.

[fol. 335] The final issue is whether the I. C. C. having found, upon investigation, that Kenneth had violated § 5(7) of the Act by acquiring and continuing control of Gilbertville Co., the I. C. C. acted without statutory authority in using that finding as a basis for denying the application of Gilbertville Co. and Nelson Co. that, by merger, the former transfer its assets to the latter. Here the I. C. C. did no more than to refuse lawful unification to companies which it had found had precipitately and perilously effectuated a prohibited union without permission. Under some imaginable circumstances, to have granted the merger application might conceivably be in the public interest. But to deny the application to formalize and strengthen a relationship already in part achieved by unlawful conduct is a clearly proper exercise of a delegated discretionary authority.

Inasmuch as the objections raised to the I. C. C. order of June 9, 1959, are all without merit, it follows that there can be no valid objection to the I. C. C. order of February 15, 1960 which merely reinstated it, nor to the I. C. C. order of July 5, 1960 which merely refused to allow Nelson Co. to escape the effect of the June 9, 1959 order by cancelling all its outstanding certificates of convenience and necessity.

Complaint dismissed with prejudice and costs.

[fol. 336]

IN UNITED STATES DISTRICT COURT
 DISTRICT OF MASSACHUSETTS
 Civil Action No. 60-562-S

GILBERTVILLE TRUCKING Co., INC. et al.,

v.

THE UNITED STATES OF AMERICA, Defendant,

and

INTERSTATE COMMERCE COMMISSION, Intervening Defendant.

JUDGMENT—July 18, 1961

Woodbury, Ch.C.J., Sweeney, Ch.D.J., Wyzanski, D.J.

After hearing and in accordance with the opinion of the Court, it is

Ordered action dismissed with prejudice and with costs.

Peter Woodbury, Chief Circuit Judge; George C. Sweeney, Chief District Judge; Charles E. Wyzanski, Jr., District Judge.

Judgment entered July 18, 1961

[fol. 337]

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF MASSACHUSETTS

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
 UNITED STATES—Filed September 11, 1961

I. Notice is hereby given that the plaintiffs above-named hereby appeal, and each of them hereby appeals, to the Supreme Court of the United States from the final

judgment entered herein July 18, 1961 dismissing the above-entitled proceeding.

This appeal is taken pursuant to 28 U.S.C. §1253.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

A. All pleadings, including

1. Verified Complaint (including appendices),
2. Motion of the Interstate Commerce Commission for Leave to Intervene as a Party Defendant,
3. Joint Answer;

[fol. 338]

B. All briefs, including

1. Brief for Plaintiffs,
2. Brief for Defendants,
3. Reply Brief for Plaintiffs;

C. Transcript of the Hearing on May 10, 1961;

D. All evidence and exhibits introduced in said case, at said Hearing;

E. Opinion of the Court dated July 7, 1961;

F. Judgment entered July 18, 1961;

G. This Notice of Appeal;

H. Copy of all Docket Entries.

III. The questions presented by this appeal are whether the District Court erred in any or all of the following respects:

A. In refusing to set aside and enjoin the enforcement of Orders of the Interstate Commerce Commission which

1. Directed that certain of the plaintiffs divest themselves of a carrier

- a. Without having made the ultimate finding, required by §5(7) of the Interstate Commerce Act, that such action is "necessary . . . to prevent continuance of such violation";
 - b. Without having made any basic findings which could support such an ultimate finding or justify such a direction; and
 - c. Without any substantial evidence which could support such basic findings or such an ultimate finding or justify such a direction.
2. Determined that plaintiffs had violated §5(4) of the Interstate Commerce Act
- a. Without having made basic findings sufficient to support such a determination; and
 - b. Without any substantial evidence which could support either the basic findings which were made or sufficient basic findings or which could support such a determination.
3. Denied the application for authority pursuant to §5(2) of the Interstate Commerce Act for plaintiff The L. Nelson & Sons Transportation Company to acquire the stock of plaintiff Gilbertville Trucking Co., Inc.

[fol. 339]

- a. Without having made basic findings sufficient to support such a denial;
- b. Disregarding the evidence comprised by the Examiner's observation of the plaintiffs and the Examiner's conclusions based upon said evidence;
- c. Without any substantial evidence which could support either the basic findings which were made or sufficient basic findings or which could support such a denial; and
- d. On the basis of "unfitness" unwarrantedly assumed because of an alleged violation of §5(4) of the Interstate Commerce Act, which

violation was based solely upon the conclusive presumptions of §§5(5) and 5(6) of the Act.

4. Were entered in flagrant disregard of §8(b) of the Administrative Procedure Act in that they were supported only by a series of statements
 - a. Some of which, as the District Court expressly found, "are trivial to the point of demonstrable irrelevance";
 - b. Some of which were unsupported by substantial evidence;
 - c. Which do not make clear the basis upon which the Commission acted; and
 - d. Which, as a matter of law, do not support either the conclusions reached or the action taken.

B. By implicitly holding that plaintiffs, who were respondents in an investigation proceeding pursuant to §5(7) of the Interstate Commerce Act, had the burden of proof before the Commission with respect to certain facts which were crucial to and determinative of that proceeding.

C. By exceeding its proper role in this proceeding for judicial review of action of the Interstate Commerce Commission,

1. By making its own, de novo findings of fact, which findings were
 - a. In addition to the findings made by the Commission and supplemental to the inadequate findings of the Commission;
 - b. In some respects contrary to express findings made by the Commission;
 - c. Unsupported by and/or contrary to the evidence.

[fol. 340]

2. By refusing, after finding that some of the findings relied upon by the Commission were "trivial

to the point of demonstrable irrelevance", to remand the case to the Commission for determination by the Commission without considering such demonstrably irrelevant findings.

3. By independently adjudging the case as "an unprejudiced, sophisticated mind" rather than reviewing the action taken by the Commission.

Foley, Hoag & Eliot, Henry E. Foley, Attorneys
for Plaintiffs, 10 Post Office Square, Boston 9,
Massachusetts.

PROOF OF SERVICE (omitted in printing).

[fol. 343]

**EXHIBIT "A" TO DISTRICT COURT PROCEEDINGS
CONSISTING OF PROCEEDINGS BEFORE THE
INTERSTATE COMMERCE COMMISSION**

Before the Interstate Commerce Commission

APPLICATION FOR AUTHORITY UNDER SECTION 5, INTERSTATE
COMMERCE ACT, TO CONSOLIDATE, MERGE, PURCHASE, OR
LEASE OPERATING RIGHTS AND PROPERTIES, OR ANY PART
THEREOF, OF A MOTOR CARRIER

(Read Instructions on page 13 before preparing)

DOCKET No. MC-F 6099

(Do not fill in)

To the INTERSTATE COMMERCE COMMISSION,

Washington, D. C.

APPLICANTS REPRESENT:

I. That this is an application of—

A The L. Nelson & Sons Transportation Company
(State full name and address of transferee¹)

Corporation

*(State whether corporation, partnership, individual,
trustee, receiver, or assignee)*

¹ Includes, (1) in a consolidation, the new corporation succeeding to assets and assuming liabilities of two or more carriers, (2) in a merger, the surviving corporation performing a similar function, (3) in a purchase, the vendee, and (4) in a lease, the lessee. If more than one transferee, use identification AA, AAA, etc.

doing business as Same

25 West Road (Mailing address: Box 181)
(Rockville, Connecticut)
(Number and street)

Ellington, Connecticut ; and
(City) (State)

B Gilbertville Trucking Co., Inc.
(State full and correct name of transferor²)

Corporation
(State whether corporation, partnership, individual,
trustee, receiver, or assignee)

doing business as Same

Hardwick Road
(Number and street)

Gilbertville, Massachusetts
(City) (State)

for authority under section 5, Interstate Commerce
Act (describe briefly the consolidation, merger,
purchase, or lease for which authority is sought)

Merger of the operating rights and properties of
transferee and transferor.

[fol. 344]

II. That transferee is controlled,³ directly or indirectly,
by the person or persons named below, and each
such person hereby joins in this application as
applicant for authority to control the operating
rights and any property sought to be acquired by
transferee, through the proposed transaction:

² Includes, in a consolidation or merger, the carrier or carriers
proposed to be liquidated, and in a purchase or lease, the vendor
or lessor, respectively. If more than one transfer, use identification
BB, BBB, etc.

³ Section 1 (3) (b), Interstate Commerce Act, provides: "For
the purposes of section 5 * * *, where reference is made to control
(in referring to a relationship between any person or persons and
another person or persons such reference shall be construed to
include actual as well as legal control, whether maintained or
exercised through or by reason of the method of or circumstances
surrounding organization or operation, through or by common
directors, officers, or stockholders, a voting trust or trusts, a holding
or investment company or companies, or through or by any other
direct or indirect means; and to include the power to exercise
control."

Name

Charles G. Chilberg,

Street Address, City, and State

33 Reed Street, Rockville, Connecticut

Name

Clifford J. O. Nelson,

Street Address, City, and State

5 Old Farm Road, Dover, Massachusetts

III. That the number of motor vehicles owned, leased, controlled, or normally operated by applicants and their affiliates, if any, during the 6-month period immediately preceding the filing of this application was:

	Transferee	Transferee's affiliate(s)	Transferor	Transferor's affiliate(s)
Busses				
Trucks	11		4	
Tractors	51		8	
Semitrailers	74		8	
Full trailers				
Pole trailers				
Other				
TOTAL	136		20	

* Section 5 (6) of the act, provides: "For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier."

* In computing the number of motor vehicles of a person involved in unifications under the provisions of section 5 of the act, the combination of a tractor and a semitrailer shall be deemed a single motor vehicle and any one tractor may be paired with any one semitrailer as a single motor vehicle but any tractor or any semitrailer in excess of those so paired shall be computed as one motor vehicle, 49 C. F. R. 180.3.

IV. That there are set forth in exhibits attached hereto and made a part hereof, the following:

EXHIBIT A.—Information respecting transferee, its affiliates if any, and the person or persons controlling transferee;

EXHIBIT B.—Information respecting transferor;

EXHIBIT C.—Nature of the proposed transaction and terms and conditions thereof; and

EXHIBIT D.—Facts and circumstances which applicants rely upon to warrant approval of the proposed transaction; and applicants will submit such additional information as the Commission may require.

V. That the person to whom correspondence with respect to this application shall be addressed is as follows:

Mary E. Kelley

(State full and correct name)

Attorney

(State title and name of company; if attorney, so state)

84 State Street, Boston, Massachusetts

(State business address of person to be addressed)

[fol. 345] WHEREFORE, Applicants pray that the Interstate Commerce Commission enter an order approving and authorizing such transaction, upon the terms and conditions, and with such modifications as it shall find to be just and reasonable; or, if it is found that the transaction is not one subject to section 5, but that it involves the transfer of a certificate or permit properly for consideration under the provisions of section 212 (b), that it be accepted and determined under those provisions and the rules and regulations promulgated thereunder.

Subscribed and sworn to this 27th day of August, 1955.

THE L. NELSON & SONS TRANSPORTATION COMPANY
(Signature of transferee)

By /s/ CHARLES G. CHILBERG

Pres. & Treas.

(Title)

By person(s) in control of transferee:

/s/ CHARLES G. CHILBERG

/s/ CLIFFORD J. O. NELSON

GILBERTVILLE TRUCKING CO., INC.

(Signature of transferor)

By /s/ KENNETH NELSON

Pres. & Treas.

(Title)

[fol. 346]

OATH

STATE OF MASSACHUSETTS }

COUNTY OF SUFFOLK }

ss.:

On the 27th day of August, 1955, before me came

Charles G. Chilberg,

President and Treasurer of Transferee

(Transferee)

Charles G. Chilberg and Clifford J. O. Nelson

(Person or persons in control of Transferee)

and

Kenneth Nelson, President and Treasurer of Transferor

(Transferor)

to me known, who, being by me duly sworn, stated that they executed the foregoing application as transferee, the person or persons controlling transferee, and transferor, or in behalf of said parties, and, if the latter, that they were authorized so to do, that the facts stated therein, as same pertain to each of said parties, respectively, are true and correct to the best of their knowledge, information, and belief.

/s/ MARY KELLEY FLYNN

Notary Public.

[SEAL]

My commission expires 12/8/58

* Attach additional separate oaths as needed.

[fol. 347]

EXHIBIT A TO APPLICATION

INFORMATION RESPECTING TRANSFEREE, ITS AFFILIATES, IF ANY, AND THE PERSON OR PERSONS CONTROLLING TRANSFEREE

Full and complete information requested below *must* be furnished. If more than one transferee, attach additional exhibits, and mark for identification; AA, AAA, etc.

1. Date and State of incorporation, formation, or organization of transferee, whichever applicable:

Date December 30, 1947 State Connecticut

2. Name, title, and business address of officers; partners, including limited or silent partners; or trustees; whichever applicable:

Name	Title
Charles G. Chilberg, President & Treasurer	
Street Address, City, and State	
33 Reed St., Rockville, Conn.	

Name	Title
Clifford J. O. Nelson, Secretary & Asst. Treas.	
Street Address, City, and State	
5 Old Farm Road, Dover, Mass.	

Name	Title
Greta C. Carlson, Vice President	
Street Address, City, and State	
25 West Road, Rockville, Conn.	

3. Name and business address of directors:

Name
Charles G. Chilberg
Street Address, City, and State
33 Reed Street, Rockville, Connecticut

Name
Clifford J. O. Nelson
Street Address, City, and State
5 Old Farm Road, Dover, Massachusetts

Name
Greta C. Carlson
Street Address, City, and State
25 West Road, Rockville, Connecticut

4. Name and business address of 10 principal stockholders, shareholders, or other owners, whichever applicable, as of May 31, 1955 (last record date) and their respective holdings. If holdings are in names of nominees, state names of real owners.

Name	Street Address, City, and State
Charles G. Chibberg	33 Reed St., Rockville, Conn.

Extent of Interest		
Class	Shares	%
Common	226	45.75

Name	Street Address, City, and State
Clifford J. O. Nelson	5 Old Farm Road, Dover, Mass.

Extent of Interest		
Class	Shares	%
Common	226	45.75

- [fol. 348] 5. If a person controlling transferee is a corporation, partnership, or association, furnish with respect to such person the information requested in 1, 2, 3, and 4 above. Not applicable.

6. (a) Is transferee a motor, rail, or water carrier, an express or sleeping-car company, a freight forwarder, or a person in control of or affiliated with such a carrier, company, or forwarder? Yes

(Answer yes or no)

- (b) Is any person controlling transferee a motor, rail, or water carrier, an express or sleeping-car company, or a freight forwarder, or controlled by or affiliated with such a carrier, company, or forwarder? Yes

(Answer yes or no)

- (c) Are any of the persons mentioned in 2, 3, 4, or 5 above, other than the persons controlling transferee, a motor, rail, or water carrier, an express or sleeping-car company, or a freight forwarder, or controlled by, in control of, or affiliated with such a carrier, company, or forwarder, other than transferee? No

(Answer yes or no)

- (d) Does transferee, any person controlling transferee, or any other above-mentioned person own any interest, direct or indirect, in, or exercise any measure

of control over any such carrier, company, or forwarder, except as disclosed herein? No

(Answer yes or no)

If answer to any of the above is "yes," explain fully, identifying each carrier, company, or forwarder; describe nature, extent, and scope of its operations, and identify Interstate Commerce Commission authority, if any, under which operations are conducted

Transferee is a motor carrier authorized to conduct interstate operations under Certificate No. MC-42871 and subs.

Mr. Chilberg and Mr. Nelson, who control transferee through stock ownership control the operations of R. A. Byrnes, Incorporated, holders of Certificate No. MC-60186, under temporary authority granted by the Commission by orders dated August 4, 1954 and January 11, 1955 in Docket No. MC-F-5749.

(See attached copies of certificate No. MC-42871 and Subs and Certificate No. MC-60186.)

[fol. 349] 7. Is transferee or any person controlling transferee, engaged, directly or indirectly, in any other form of transportation or activity connected with transportation? No If answer is "yes," indicate the nature, extent, and scope thereof

(Answer yes or no)

The exhibits requested below, identified as indicated, must be furnished respecting transferee and the person or persons controlling transferee, except that, if the latter are noncarrier individuals who do not own any voting stock in, or control any other carrier subject to the Interstate Commerce Act, the exhibits requested respecting transferee only need be furnished. If data are not available or are inapplicable, so state.

Attach to original only: (If documents here specified have been previously filed with the Interstate Commerce Commission in connection with any application, it will be

sufficient to make reference to the docket number under which filed: *Provided*, That any change or changes occurring since such filing shall be shown in separate statement attached hereto and identified to correspond with the specific exhibit herein requested.)

A-1. Authenticated copy of articles of incorporation and by-laws, with all amendments; or authenticated copy of articles of partnership, association, trust agreement, or other documents evidencing organization, whichever applicable. See Docket No. MC-F-4629.

A-2. Authenticated copy of annual report to stockholders or shareholders for year preceding date of filing this application. No such report prepared.

Attach to *original and each copy*:

A-3. Copy of all resolutions of directors authorizing the transaction proposed, authenticated by proper executive officer; and, if the charter or by-laws require approval by the stockholders, copy of resolutions of stockholders authorizing the transaction proposed, and indicating the percentage of stock voting for such authorization.

A-4. Copies of all resolutions of stockholders or directors, or duly authorized committee thereof, authenticated by proper executive officer, designating by name and for that purpose the executive officer by whom the application is signed, verified, and filed.

If transferee or a person controlling transferee is an organization other than a corporation, furnish documentary evidence showing authorization and designation of the individual signing, verifying, and filing the application.

If the party by whom the application is signed, verified, and filed is a trustee, receiver, or like representative, furnish a certified copy of the order of the court, if any, having jurisdiction, authorizing the contemplated action.

A-5. Balance sheet statement as of the latest available date.

A-6. Analysis of intangible property accounts including for each item date of acquisition, source of authority, account in which presently recorded, amounts thereof, reserve, and policy and practice followed with respect to amortization of intangible property.

A-7. Income statement for current calendar year to the latest available date and for each of the two preceding calendar years.

[fol. 350]

EXHIBIT "A" TO EXHIBIT "A"

**CERTIFICATE OF PUBLIC CONVENIENCE
AND NECESSITY**

NO. MC 60186

**R. A. BYRNES, INCORPORATED,
MULLICA HILL, NEW JERSEY**

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D.C., on the 1st day of April, A. D. 1941.

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or

may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

IRREGULAR ROUTES:

General commodities, except explosives, poles, canned foods, and commodities used in canning for processing food,

From points and places in New Jersey to Philadelphia, Pa., and points and places within 25 miles of Philadelphia.

From New York, N. Y., and points and places in New Jersey to points and places in Delaware north of U. S. Highway 40, those in Maryland east of U. S. Highway 1 and north of U. S. Highway 50, and to the District of Columbia and points and places in Maryland and Virginia within 25 miles of the District of Columbia.

Return, with no transportation for compensation except as otherwise authorized, to the above-specified origin points.

Between New York, N. Y., on the one hand, and on the other, Philadelphia, Pa., and points and places in Pennsylvania within 25 miles of Philadelphia, and points and places in New Jersey.

Fertilizer,

From Baltimore, Md., and Philadelphia, Pa., to points and places in New Jersey.

[fol. 351] **OIL,** in containers

From Claymont, Del., to Camden, N. J.

Produce, except such as is used in canning or processing food.

From points and places in Gloucester, Salem, and Cumberland Counties, N. J., to the District of Colum-

bia, points and places in Pennsylvania east of U. S. Highway 19, and those in New York on and east of U. S. Highways 9W and 32, and South of New York Highway 7.

Return, with no transportation for compensation except as otherwise authorized, to the above-specified origin points.

AND IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, division 5.

W. P. BARTEL
Secretary.

(SEAL)

[fol. 352]

EXHIBIT A

PERMIT

NO. MC 93421

R. A. BYRNES, INCORPORATED,
MULLICA HILL, NEW JERSEY

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 25th day of April, A. D. 1941.

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby granted this Permit as evidence of the authority

of the holder to engage in transportation in interstate or foreign commerce as a contract carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

IRREGULAR ROUTES:

Commodities used in canning or processing food,

From New York, N.Y., Philadelphia, Pa., and Baltimore, Md., to Swedesboro, N. J., with no transportation for compensation on return, except as otherwise authorized.

Canned Goods,

From Swedesboro, N. J., to points and places in Massachusetts, Rhode Island, Connecticut, Delaware, Maryland, and the District of Columbia, those in Pennsylvania east of U. S. Highway 220, those in New York on, south, and east of a line beginning at the Vermont-New York State line, and extending along New York Highway 7, to Junction New York Highway 32, thence along New York Highway 32 to Albany, N. Y., thence along U. S. Highway 9W to Kingston, N.Y., and thence along U. S. Highway 209 to the New York-New Jersey State line, and those in Virginia within 25 miles of the District of Columbia; and

Returned or rejected shipments of canned goods,

From the above-specified destination points to Swedesboro.

AND IT IS FURTHER ORDERED, That this permit shall be effective from the date hereof and shall remain in effect until suspended, changed, or revoked as provided in the said Act.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(SEAL)

EXHIBIT "A" TO EXHIBIT "A"

CERTIFICATE OF PUBLIC CONVENIENCE
AND NECESSITY

NO. MC 42871 Sub 3*

THE L. NELSON & SONS TRANSPORTATION
COMPANY, A CORPORATION,
ELLINGTON, CONNECTICUT

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 27th day of April, A. D. 1955

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, that the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

IRREGULAR ROUTES:

Materials used in the manufacture of cloth, waste materials resulting from the manufacture of cloth, and supplies and materials used in connection with the transportation or processing of these commodities,

* Certificate No. MC 42871 is revoked as herein above ordered.

when moving to or from places of processing, except liquid commodities, in bulk, in tank vehicles,

Between Hudson, North Chelmsford, Norton, Lowell, Lawrence, and Marlboro, Mass., on the one hand, and, on the other, Manchester, Concord, and Somersworth, N. H., and points in Providence and Bristol Counties, R. I.

Between Providence, Woonsocket, and Pawtucket, R. I., and Hartford, Hazardville and Somersville, Conn., and points in that part of Massachusetts east of the Connecticut River, on the one hand, and, on the other, New York, N. Y., Jersey City, Passaic, Newark, and Camden, N. J., Philadelphia, Pa., and points in Pennsylvania within 30 miles of Philadelphia.

[fol. 354] Between Hazardville, Conn., on the one hand, and, on the other, Millbury and East Douglas, Mass.

From Philadelphia, Pa., and Camden, N. J., to points in those parts of Tolland and Hartford Counties, Conn., on and north of U. S. Highway 6, and

Empty containers used in transporting the commodities named above,

From points in those parts of Tolland and Hartford Counties, Conn., on and north of U. S. Highway 6, to Philadelphia, Pa., and Camden, N. J.

IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

AND IT IS FURTHER ORDERED, That Certificate No. MC 42871, issued February 21, 1951, be, and it is hereby, revoked.

By the Commission, division 5.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 355]

EXHIBITS A-3 AND A-4 TO EXHIBIT "A"

**CERTIFIED COPY OF VOTE OF BOARD OF
DIRECTORS OF THE L. NELSON & SONS
TRANSPORTATION COMPANY.**

I, Clifford J. O. Nelson, Secretary of The L. Nelson & Sons Transportation Company, a corporation duly authorized and existing under the laws of the State of Connecticut, hereby certify that at a special meeting of the Board of Directors of said corporation duly called for the purpose and held at the office of the corporation in Ellington, Connecticut, on the 18th day of August, 1955, all of the Directors being present and voting, the following vote was unanimously adopted:

"VOTED: That Charles G. Chilberg, President and Treasurer of this Corporation be and he is hereby authorized and directed to execute in the corporation's name and seal with its seal an agreement whereby this corporation agrees to purchase 100 shares of the common stock of Gilbertville Trucking Co., Inc. of Gilbertville, Massachusetts, being all of the issued and outstanding stock of said corporation, and for the merger of the operating rights and property of Gilbertville Trucking Co., Inc. with those of this corporation for the consideration and under the terms and conditions set forth in said agreement which was presented and read to the meeting; and to execute all applications and to take all action convenient or necessary to obtain requisite approval of the Interstate Commerce Commission to the proposed transaction."

A true copy.

Attest.

/s/ CLIFFORD J. O. NELSON
Clifford J. O. Nelson,
Secretary

THE L. NELSON
BALANCE

Current Assets:

Cash		2,521.00	
Accounts Receivable		117,247.00	
Receivables from Employees, etc.		7,672.49	
Tires and Tubes on Hand	10,839.10		
Unused Materials, Parts	8,739.22	1,578.32	
Six Shares - L. Nelson Stock		600.00	\$147,625.72

Deferred Charges to Income:

Prepaid Stationery & Printed Matter		1,890.57	
Prepaid interest		7,691.14	
Prepaid Rent - New York Terminal		2,100.00	
Prepaid Vacation Payroll		1,885.20	
Eldridge Franchise (MC-F-4629)	5,560.61		
Res. for Amortization	5,560.61	--	
Organization - Legal Fees	591.37		
Reserve for Amortization	591.37	--	13,566.91

Fixed Assets:

Revenue Equip., trucks, etc.	456,260.75		
Res. for Depreciation	213,931.35	242,329.40	
Service and Passenger cars	26,039.49		
Res. for Depreciation	16,920.00	9,119.49	
Shop and Garage Equipment	4,727.76		
Reserve for Depreciation	2,850.11	1,877.65	
Furniture & Office Equip.	11,689.24		
Res. for Depreciation	4,667.64	7,021.60	
Hoist & Fork Lift Truck	13,795.25		
Reserve for Depreciation	6,751.61	7,043.64	267,391.78

TOTAL ASSETS

\$428,584.41

Fixed Assets:

Revenue Equip., trucks, etc.	456,260.75		
Res. for Depreciation	<u>213,931.35</u>	242,329.40	
Service and Passenger cars	26,039.49		
Res. for Depreciation	<u>16,920.00</u>	<u>9,119.49</u>	
Shop and Garage Equipment	4,727.76		
Reserve for Depreciation	<u>2,850.11</u>	1,877.65	
Furniture & Office Equip.	11,689.24		
Res. for Depreciation	<u>4,667.64</u>	7,021.60	
Hoist & Fork Lift Truck	13,795.25		
Reserve for Depreciation	<u>6,751.61</u>	<u>7,043.64</u>	<u>267,391.78</u>
TOTAL ASSETS			<u>\$428,584.41</u>

LIABILITIES

Current Liabilities:

Accounts Payable	85,487.04		
Employee Taxes Withheld	9,220.38		
Res. for Fed. Freight Tax	5,455.53		
Accrued Wages to May 31, 1955	3,502.52		
Accrued Payroll Taxes to May 31/55	3,952.42		
Due to the Bergeon Company	4,744.48		
Res. for Cargo Loss & Damage	3,370.64		
Res. for Fed. & State Corp. Tax	<u>13,414.98</u>	129,147.99	

Long Term Loans & Notes Payable:

Notes Payable - Equipment	138,008.19		
Notes Payable - Officers	<u>9,691.08</u>	<u>147,699.27</u>	276,847.26

CAPITAL

Capital Stock Outstanding		50,000.00	
Unearned (Paid In) Surplus		837.38	
Earned Surplus - Jan. 1, 1955	79,114.23		
Net Profit-5 months ended 5/31/55	<u>21,785.54</u>	<u>100,899.77</u>	

Net Worth		<u>151,737.15</u>	
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TOTAL LIABILITIES & CAPITAL			<u>\$428,584.41</u>
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[fol. 356]

EXHIBIT A-5 TO EXHIBIT "A"

THE L. NELSON AND SONS TRANSPORTATION COMPANY
OPERATING STATEMENT
FROM JANUARY 1, 1955 TO MAY 31, 1955

[fol. 357]

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EXHIBIT A-7(1) TO EXHIBIT "A"

Revenues:

Operating Freight Revenues

\$490,727.33

Operation & Maintenance Expenses:

Equipment Maintenance

\$70,733.94

Transportation

141,073.46

Terminal

108,560.25

Traffic

5,221.68

Insurance & Safety

25,935.35

Administrative & General

40,444.71

Total Operation & Maintenance Expense 391,969.39

• Other Expenses:

Depreciation Expense

32,025.03

Depreciation Adjustment (Gain)

(2,328.96)

Operating Taxes & Licenses

30,229.64

Total Expenses

59,925.71 451,895.10

Net Operating Revenue

38,832.23

Other Deductions:

3,631.71

Net Income before Income Taxes

35,200.52

Income Taxes

13,414.98

NET INCOME

\$21,785.54

THE L. NELSON AND SONS TRANSPORTATION COMPANY
 OPERATING STATEMENT
FROM JANUARY 1, 1954 to DECEMBER 31, 1954

REVENUE:

Operating Freight Revenues	\$889,420.00
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OPERATION & MAINTENANCE EXPENSES:

Equipment maintenance	\$136,109.00
Transportation	288,667.00
Terminal	225,207.00
Traffic	8,541.00
Insurance & Safety	56,069.00
Admin. & General	<u>53,981.00</u>

Total Operation & Mainten. Expenses \$768,374.00

OTHER EXPENSES:

Depreciation Expense	68,286.00
Depreciation Adjustment	(8,997.00)
Operating Taxes & Licenses	<u>53,551.00</u>

Total Expenses

112,840.00

881,214.00

NET OPERATING REVENUE

8,206.00

OTHER DEDUCTIONS:

5,394.00

NET INCOME BEFORE INCOME TAXES

2,812.00

Income Taxes

175.00

NET INCOME

\$ 2,637.00

[fol. 358] EXHIBIT A-1(2) TO EXHIBIT "A"

THE L. NELSON & SONS TRANSPORTATION COMPANY
INCOME STATEMENT
JANUARY 1, 1953 to DECEMBER 31, 1953

[Vol. 359]

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EXHIBIT A-7(3) TO EXHIBIT "A"

REVENUES:

Operating Revenues

\$895,774

EXPENSES:

Operating & Maintenance Expense

\$766,729

Depreciation Expense

48,041

Depreciation Adjustment (Credit)

(2,701)

Operating Taxes & Licenses

54,169

Total Expenses

866,238

Net Operating Revenue

29,536

DEDUCTIONS FROM ORDINARY INCOME:

Interest

1,626

Other Deductions

232

1,858

Net Income before Income Taxes

27,678

Provision for Income Taxes, Fed. & State

7,696

Net Income transferred to Earned Surplus
for twelve months ending December 31, 1953..

\$19,982

[fol. 360]

EXHIBIT B TO APPLICATION

INFORMATION RESPECTING TRANSFEROR

Full and complete information requested below *must* be furnished. If more than one transferor, attach additional exhibits, and mark for identification BB, BBB, etc.

1. Date and State of incorporation, formation, or organization of transferor, whichever applicable: Date June 26, 1940 State Massachusetts.

2. Is there any financial or other relationship, direct, or indirect, existing between transferor and other applicants? Yes. If answer is "yes," explain: Mr.

(Answer yes or no)

Chilberg and Mr. Nelson the controlling stockholders of Transferee are brothers of Mr. Kenneth Nelson the controlling stockholder of transferor. They each are stockholders of the Bergson Company, a real estate holding company.

3. (a) Describe briefly the motor-carrier operating rights of transferor for which authority to consolidate, merge, purchase, or lease is sought, furnishing number or numbers assigned thereto by the Interstate Commerce Commission: See copy of operating authority contained in Certificate No. MC-87431 and Subs thereunder attached hereto.

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- (b) If only part of transferor's operating authority is involved in the proposed transaction, so state and describe in similar manner operating authority be-

ing retained: All of transferor's operating rights and property are involved in this transaction.

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.....

- (c) If the transaction involves other properties of transferor, so state and generally describe the properties: All of the motor carrier property of transferor including motor vehicles, office furniture and fixtures, garage equipment, miscellaneous parts, etc. are included in this transaction.

[fol. 361]

4. Are operations being conducted by transferor under the operating rights involved in the proposed transaction? Yes. If answer is "no," explain:

(Answer yes or no.)

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The exhibits requested below, identified as indicated, must be furnished respecting transferor. If data requested are not available or are inapplicable, so state.

Attach to *original* only: (If documents here specified have been previously filed with the Interstate Commerce Commission in connection with any application, it will be sufficient to make reference to the docket number under which filed: *Provided*, That any change or changes occurring since such filing shall be shown in separate statement attached hereto and identified to correspond with the specific exhibit herein requested.)

- B-1. If transferor operates as a common carrier in interstate or foreign commerce solely within a single State, under the partial exemption of the second proviso of section 206 (a), Interstate Commerce Act, attach certified copy of State operating authority. Not applicable.

Attach to *original* and *each copy*:

B-2. Copy of all resolutions of directors authorizing the transaction proposed, authenticated by proper executive officer; and, if the charter or by-laws require approval by the stockholders, copies of resolutions of stockholders authorizing the transaction proposed, and indicating the percentage of stock voting for such authorization.

B-3. Copies of all resolutions of stockholders or directors, or duly authorized committee thereof, authenticated by proper executive officer, designating by name and for that purpose the executive officer by whom the application is signed, verified, and filed.

If transferor is an organization other than a corporation, furnish documentary evidence showing authorization and designation of the individual signing, verifying, and filing the application.

If the party by whom the application is signed, verified, and filed is a trustee, receiver, or like representative of transferor, furnish a certified copy of the order of the court, if any, having jurisdiction, authorizing the contemplated action.

B-4. Balance sheet statement as of the latest available date.

B-5. Analysis of intangible property accounts including for each item date of acquisition, source of authority, account in which presently recorded, amounts thereof, reserve, and policy and practice followed with respect to amortization of intangible property.

B-6. Income statement for current calendar year to the latest available date and for each of the two preceding calendar years.

B-7. Abstract showing actual shipments transported during the 6 months preceding the filing of the application (date, origin point, destination point, and commodity), under the operating authority involved in the proposed transaction. Indicate whether all shipments or only representative shipments are included, and, if traffic was interchanged, specify the point at which such interchange was effected.

[fol. 362]

EXHIBIT B TO EXHIBIT "B"

**CERTIFICATE OF PUBLIC CONVENIENCE
AND NECESSITY**

NO. MC 87431*

**GILBERTVILLE TRUCKING CO., INC.,
GILBERTVILLE, MASSACHUSETTS**

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 25th day of February, A. D. 1955

AFTER DUE INVESTIGATION: It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding:

IT IS ORDERED. That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

REGULAR ROUTES:

General commodities, except those of unusual value, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between Lowell, Mass., and Boston, Mass., serving the intermediate and off-route points listed below, over routes as follows:

From Lowell over U. S. Highway 3 to Boston;

From Lowell over U. S. Highway 3 to Burlington, Mass., thence over unnumbered highway to Woburn, Mass., thence over Massachusetts highway 38 to Boston;

From Lowell over Massachusetts Highway 38 via Wilmington, Mass., to Woburn, Mass., thence over unnumbered highway (old Massachusetts Highway 128) to Stoneham, Mass. (also from Wilmington over Massachusetts Highway 129 to Reading, Mass., thence over Massachusetts Highway 28 to Stoneham), thence over Massachusetts Highway 28 to Boston;

From Lowell over U. S. Highway 3 to Tyngsboro, Mass., thence over unnumbered highway via Collinsville, Mass. to Dracut, Mass., thence over Massachusetts Highway 113 to Methuen, Mass., thence over Massachusetts Highway 28 to Boston;

[fol. 363] From Lowell over Massachusetts Highway 110 to Haverhill, Mass., thence over Massachusetts Highway 125 to Bradford, Mass., thence over unnumbered highway via South Groveland, Mass. to West Boxford, Mass. (also from Bradford over unnumbered highway approximately three miles west of South Groveland to West Boxford),

thence over unnumbered highway to junction unnumbered highway at a point approximately five miles northwest of Boxford, Mass., thence over unnumbered highway to North Andover, Mass., thence over unnumbered highway to junction Massachusetts Highway 114, thence over Massachusetts Highway 114 to junction Massachusetts Highway 125, thence over Massachusetts Highway 125 to junction Massachusetts Highway 28, thence over Massachusetts Highway 28 to Boston;

From Lowell to junction Massachusetts Highways 114 and 125, as specified above, thence over Massachusetts Highway 114 to junction unnumbered highway, thence over unnumbered highway via North Reading and Lynnfield, Mass. to Wakefield, Mass., thence over Massachusetts Highway 129 to Junction U.S. Highway 1, thence over U. S. Highway 1 to junction unnumbered highway, thence over unnumbered highway via Melrose, Mass. to Malden, Mass., thence over Massachusetts Highway 60 to junction Massachusetts Highway 28, thence over Massachusetts Highway 28 to junction Massachusetts Highway 1-A, thence over Massachusetts Highway 1-A to junction Massachusetts Highway C-1, thence over Massachusetts Highway C-1 to Boston;

From Lowell to Wakefield, Mass., as specified above, thence over unnumbered highway (old Massachusetts Highway 128) to Stoneham, Mass., thence over unnumbered highway to junction Massachusetts Highway 38, thence over Massachusetts Highway 38 to Boston;

From Lowell over Massachusetts Highway 133 to Frye Village, Mass., thence over Massachusetts Highway 28 to Andover, Mass., thence over unnumbered highway to Tewksbury, Mass., thence over Massachusetts Highway 38 to Boston;

From Lowell to Andover, Mass., as specified above, thence over unnumbered highway via Ballard Vale,

Mass. to junction Massachusetts Highway 62, thence over Massachusetts Highway 62 to Wilmington, Mass., thence over Massachusetts Highway 38 to Boston;

From Lowell over Massachusetts Highway 110 via Chelmsford, Mass., to junction unnumbered highway near Westford, Mass., thence over unnumbered highway via Westford and West Chelmsford, Mass. to junction U. S. Highway 3, thence over U. S. Highway 3 to Tyngsboro, Mass. (also from Chelmsford over Massachusetts Highway 4 to North Chelmsford, Mass., thence over U. S. Highway 3 to Tyngsboro), thence as specified above to Boston;

[fol. 364] From Lowell over unnumbered highway via North Billerica, Mass., to junction U. S. Highway 3, thence over U. S. Highway 3 to Billerica, Mass., thence over unnumbered Highway to Bedford Springs, Mass., thence over Massachusetts Highway 4 to Bedford, Mass., thence over Massachusetts Highway 62 to Concord, Mass., thence over Massachusetts Highway 2-A via Lexington, Mass., to Boston; (also from junction Massachusetts Highway 2-A and unnumbered highway approximately three miles west of Lexington over unnumbered highway to Lexington, thence over Massachusetts Highway 2-A to Boston) (also from Concord over Massachusetts Highway 126 to junction Massachusetts Highway 2, thence over Massachusetts Highway 2 to Boston; also from Concord over Massachusetts Highway 126 to junction unnumbered highway at a point approximately three miles southeast of Concord, thence over unnumbered highway via Lincoln, Mass., to Boston; also from Concord over above-specified route to junction unnumbered highway at a point approximately three miles east of Lincoln, Mass., thence over unnumbered highway to junction Massachusetts Highway 117, thence over Massachusetts Highway 117 to junction U. S. Highway 20, thence over U. S. Highway 20 to Boston);

From Lowell to Reading, Mass., as specified above, thence over unnumbered highway to junction another unnumbered highway (old Massachusetts Highway 128), thence over unnumbered highway via Woburn, Mass., to junction Massachusetts Highway 2-A, thence over Massachusetts Highway 2-A to Boston;

From Lowell to Billerica, Mass., as specified above, thence over unnumbered highway via Pattenville, Mass., to junction Massachusetts Highway 38, thence over Massachusetts Highway 38 to junction unnumbered highway at a point approximately six miles north of Wilmington, Mass., thence over unnumbered highway via North Wilmington, Mass., to Andover, Mass., ~~thence~~ over Massachusetts Highway 28 to Boston;

From Lowell to Bedford, Mass., as specified above, thence over Massachusetts Highway 62 to junction Massachusetts Highway 28, thence over Massachusetts Highway 28 to Boston;

From Lowell to Bedford, Mass., as specified above, thence over Massachusetts Highway 25 to junction Massachusetts Highway 2-A, thence over Massachusetts Highway 2-A to Boston;

From Lowell to Billerica, Mass., as specified above, thence over unnumbered highway to junction Massachusetts Highway 38 at a point approximately four miles north of Wilmington, Mass., thence over Massachusetts Highway 38 to Boston;

From Lowell to Boston, as specified above, thence over Massachusetts Highway 138 to junction Massachusetts Highway 135, thence over Massachusetts Highway 135 to junction U. S. Highway 1, thence over U. S. Highway 1 to Boston, thence over unnumbered highway via Needham Heights, Mass., to Needham, Mass., thence over Massachusetts Highway 135 to Wellesley, Mass., thence over Massachusetts Highway 16 via Wellesley Heights

Mass., to Boston (also from Wellesley Heights over Massachusetts Highway 9 to Boston); and

[fol. 265] Return over above-specified routes to Lowell.

Service is authorized to and from the intermediate points of Billerica, Burlington, Woburn, Winchester, Medford, Tewksbury, Wilmington, North Woburn, Reading, Stoneham, Wakefield, Melrose, Malden, Everett, Methuen, Andover, North Andover, Somerville, Charlestown, Cambridge, Brookline, Arlington, Chelmsford, Bedford, Concord, Lexington, Waltham, Watertown, Haverhill, Bradford, and Wellesley, Mass., and the off-route points of Boxford, Groveland, Graniteville, West Haverhill, and Chelsea, Mass.

Sanitary napkins, facial tissues, and paper boxes.

Between New York, N. Y., and Wilmington, Del., serving the intermediate point of Philadelphia, Pa., and the off-route point of Rockland, Del.:

From New York over U. S. Highway 1 to Philadelphia, Pa., thence over U. S. Highway 13 to Wilmington, and return over the same route.

IRREGULAR ROUTES:

General commodities, except those of unusual value, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading.

Between points in Massachusetts.

Between the Town of Hardwick, Mass., on the one hand, and, on the other, New York, N. Y., and points in New York and New Jersey within 20 miles of New York, N. Y.

Sanitary napkins, facial tissues, and machinery.

From Hardwick, Mass., to Boston, Mass., New York, N. Y., and points in New York and New Jersey within 20 miles of New York, N. Y.

Pickled skins.

From New York, N. Y. to Ipswich and Peabody, Mass.

Pulpboard.

From Boston, Mass., to Hardwick, Mass.

Materials used or useful in the manufacture and sale of sanitary napkins and facial tissues.

From New York, N. Y., and points in New York and New Jersey within 20 miles of New York, N. Y., to Hardwick, Mass.

[fol. 366] *Fertilizer, and fertilizer materials.*

From Portland, Conn., to Hardwick, Mass., and points in Massachusetts within 15 miles of Hardwick.

Lime, and limestone products.

From Adams and Lee, Mass., to Hamden, East Hartford, and Hartford, Conn., Providence and Woonsocket, R. I., New York, N. Y., and points in New Jersey within ten miles of New York, N. Y.

Agricultural commodities.

From Hardwick, Mass., to Merose, Conn., and New York, N. Y.; and

Return with no transportation for compensation except as otherwise authorized, to above-specified origin points.

General commodities, except those of unusual value, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading.

Between Palmer, Mass., and points in Massachusetts within ten miles of Palmer, on the one hand, and, on the other, points in Connecticut and Rhode Island.

Between Palmer and Monson, Mass., on the one hand; and, on the other, points in Massachusetts within five miles of Palmer and Monson.

Household goods as defined by the Commission.

Between Palmer, Mass., and points in Massachusetts within ten miles of Palmer, on the one hand, and, on the other, points in Vermont.

Household goods.

Between Hardwick, Mass., on the one hand, and, on the other, points in Connecticut, New Jersey, New York, and Rhode Island.

Livestock.

Between Palmer, Mass., and points in Massachusetts within ten miles of Palmer, on the one hand, and, on the other, points in Vermont.

Any repetition in the statement of the authority granted herein shall be construed as conferring only a single operating right.

IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

[fol. 367]. AND IT IS FURTHER ORDERED: That this certificate shall supersede: (1) Certificates Nos. MC 87431 and MC 87431 Sub 7, issued to the above named carrier July 8, 1942 and March 12, 1948, respectively; (2) Certificate No. MC 64627, issued June 2, 1943, acquired by above named carrier pursuant to MC EC 57090 (as corrected), assigned No. MC 87431 Sub 8, and that said certificates be, and they are hereby, canceled.

By the Commission, division 5.

GEORGE W. LAMB,
Secretary.

(SEAL)

* This certificate embraces the operating rights in the certificates superseded and canceled in the last ordering paragraph above.

[fol. 368] EXHIBITS B-2 AND B-3 TO EXHIBIT "B"

**CERTIFIED COPY OF VOTE OF STOCKHOLDERS
AND BOARD OF DIRECTORS OF GILBERTVILLE
TRUCKING CO., INC.**

I, Arthur Paroshinsky, Clerk of Gilbertville Trucking Co., Inc., a corporation duly authorized and existing under the laws of the Commonwealth of Massachusetts, hereby certify that at a special joint meeting of the Stockholders and Board of Directors of Gilbertville Trucking Co., Inc. held at Gilbertville, Massachusetts on the 18 day of August, 1955 all of the said Stockholders and Directors being present and voting, the following vote was unanimously adopted:

"VOTED: That Kenneth Nelson, President and Treasurer of this corporation be and he is hereby authorized and directed to execute a proposed agreement which was presented and read to the meeting providing for the sale of all of the stock of this corporation to The L. Nelson & Sons Transportation Company, and for the merger of all the properties of this company with those of The L. Nelson & Sons Transportation Company; and to do and perform all other matters and things necessary to obtain requisite approval of the Interstate Commerce Commission and other regulatory bodies having jurisdiction and to consummate the transaction in accordance with the terms of said agreement."

A true copy.

Attest:

(S) ARTHUR PAROSHINSKY
Arthur Paroshinsky,
Clerk

GILBERTVILLE TRUCKING CO., INC.

BALANCE SHEET. MAY 31, 1955

ASSETS

Current Assets:

Cash	791.87	
Accounts Receivable	<u>71,868.36</u>	72,660.23

Deferred Charges to Income:

Prepaid interest	1,375.05	
Original Organization Legal Fees	150.00	
Lewis Marmer Franchise	7,500.00	
Reservé for Amortization	<u>1,250.00</u>	<u>6,250.00</u>
		7,775.05

Fixed Assets:

Revenue Equip., trucks, etc.	68,937.31	
Res. for Depreciation	<u>21,301.73</u>	47,635.58

Furniture and Office Equip.	1,969.31	
Res. for Depreciation	<u>76.09</u>	1,893.22

Service Cars	1,222.21	
Res. for Depreciation	<u>432.82</u>	<u>789.39</u>
		50,318.19

I.C.C. rights		<u>1,250.00</u>
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TOTAL ASSETS

\$132,003.47

Furniture and Office Equip.	1,969.31		
Res. for Depreciation	<u>76.09</u>	1,893.22	
Service Cars	1,222.21		
Res. for Depreciation	<u>432.82</u>	<u>789.39</u>	50,318.19
I.C.C. rights			<u>1,250.00</u>
TOTAL ASSETS			<u>\$132,003.47</u>

LIABILITIES

Current Liabilities:

Accounts Payable	\$59,695.84		
Employee Taxes Withheld	3,067.46		
Federal Freight Tax Payable	2,388.57		
Res. for Cargo Loss & Damage	527.25		
Accrued Payroll Taxes	1,095.13		
Reserve for State & Fed. Corp. tax	<u>3,880.15</u>	70,654.40	

Long Term Loans & Notes Payable:

Notes Payable - Equipment	21,683.38		
Notes Payable - Officers	<u>14,037.75</u>	<u>35,721.13</u>	106,375.52

CAPITAL

Capital Stock Outstanding		100.00	
Unearned (Paid in) Surplus		32,366.23	
*Earned Surplus - Deficit	(16,629.85)		
Net Profit for Five Months ended May 31, 1955	<u>9,191.56</u>	<u>(7,438.29)</u>	
Net Worth			<u>25,627.94</u>
TOTAL LIABILITIES & CAPITAL			<u>\$132,003.47</u>

*Deficit \$39,868.34 existed on March 1, 1953, date Capital Stock was acquired by present stockholders.

[fol. 369]

EXHIBIT B-4 TO EXHIBIT "B"

GILBERTVILLE TRUCKING COMPANY, INCORPORATED
OPERATING STATEMENT - JAN. 1, 1955 to MAY 31, 1955.

[fol. 370] EXHIBIT B-6(1) to EXHIBIT "B"

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REVENUE:

Operating Freight Revenues \$151,746.67

OPERATION & MAINTENANCE EXPENSES:

Equipment Maintenance	\$ 3,931.61
Transportation	89,781.56
Terminal	17,593.79
Traffic	214.08
Insurance & Safety	5,971.58
Administrative and General	<u>6,014.73</u>

Total Operation & Maintenance Exp. 123,507.35

OTHER EXPENSES:

Depreciation Expense	4,849.07
Amort. Chargeable to Operations	625.00
Operating Taxes & Licenses	<u>8,497.20</u>
Total Expenses	<u>13,971.27</u>

13,971.27 137,478.62

Net Operating Revenue 14,268.05

OTHER DEDUCTIONS:

1,553.06

Net Income Before Income Taxes 12,714.99

Income Taxes 3,523.43

NET INCOME \$9,191.56

GILBERTVILLE TRUCKING COMPANY, INCORPORATED
 OPERATING STATEMENT
 JANUARY 1, 1954 to DECEMBER 31, 1954.

REVENUES:

Operating Freight Revenues	\$117,818.79
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OPERATION & MAINTENANCE EXPENSES:

Equipment Maintenance	\$5,084.22
Transportation	58,576.40
Terminal	2,753.31
Insurance & Safety	5,218.96
Adm. & General	<u>34,027.82</u>

Total Operation & Maint. Expenses	\$105,660.78
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OTHER EXPENSES:

Depreciation Expense	8,540.92
Amort. Chargeable to Operations	625.00
Operating Taxes & Licenses	3,722.53

Total Expenses	<u>12,888.45</u>	118,549.23
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NET OPERATING REVENUE

LOSS (730.44)

OTHER DEDUCTIONS:

NET INCOME BEFORE INCOME TAXES	LOSS	(1,158.84)
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Income Taxes		<u>1,340.35</u>
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NET INCOME

(\$ 2,499.19)

[Fol. 371] EXHIBIT B-6(2) TO EXHIBIT "B"

GILBERTVILLE TRUCKING COMPANY, INCORPORATED
OPERATING STATEMENT
JANUARY 1, 1953 to DECEMBER 31, 1953

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[fol. 372]

EXHIBIT B-6(3) TO EXHIBIT "B"

REVENUE:

Operating Freight Revenues \$75,489.57

OPERATION & MAINTENANCE EXPENSES:

Equipment Maintenance	\$5,968.61
Transportation	26,578.20
Terminal	4,910.63
Insurance & Safety	5,711.39
Administrative & General	<u>4,389.37</u>

Total Operation & Mainten. Expenses \$47,558.20

OTHER EXPENSES:

Depreciation Expense	4,461.83
Depreciation Adjustment	(2,234.68)
Operating Taxes & Licenses	<u>2,229.87</u>

Total Expenses	<u>4,457.02</u>	<u>52,015.22</u>
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Net Operating Revenue	23,474.35
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OTHER DEDUCTIONS:

Net Income Before Income Taxes	634.48
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Income Taxes	22,839.87
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NET INCOME	<u>2,525.51</u>
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	<u>\$20,314.36</u>
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[fol. 373]

EXHIBIT C TO APPLICATION

NATURE OF PROPOSED TRANSACTION AND
TERMS AND CONDITIONS THEREOF

Attach to original and each copy of this application the following exhibits, identifying as indicated. If data requested are not available, or are inapplicable, so state.

C-1. Copy of every contract or other written instrument or instruments entered into, or proposed to be entered into, pertaining to the transaction, or if not contained in written contract or other instrument, a statement, identified as such, containing detailed description of the transaction.

C-2. Statement showing ledger value (or estimated value where ledger value not available) for property proposed to be acquired, segregated by items in accordance with Uniform System of Accounts for Motor Carriers, with further segregation of revenue automotive equipment on basis of buses, trucks, tractors, semitrailers, full trailers, pole trailers, and miscellaneous equipment.

C-3. Statement containing the following information for each item of property proposed to be acquired, if encumbered, and transferee has agreed to assume obligation in regard thereto:

- (a) Description of the property encumbered.
- (b) Amount of encumbrance and full description thereof, including maturity, interest, other terms and conditions, and whether amount is evidenced by a promissory note.
- (c) Amount of encumbrance to be assumed by transferee.

- C—4. Statement explaining how transferee proposes to meet the financial requirements of the transaction, including, if a loan is involved, the amount, maturity, interest rate, other terms and conditions, and whether a promissory note will be issued.
- C—5. If application is for authority to consolidate, merge, or purchase, "giving effect" balance sheet for transferee as of the latest available date, showing the effect of consummation of the proposed transaction.
- C—6. Statement indicating how transferee proposes to treat additions, if any, to intangible property accounts resulting from consummation of the proposed transaction.
- C—7. "Giving effect" income statement for the current calendar year to date, for transferee, showing estimated adjustments and eliminations which would have resulted from consummation of the proposed transaction.
- C—8. Map showing all operations of applicants and affiliates of transferee, if any, as of date of application, and identifying their respective routes by distinguishing colors. If the operations are such that they cannot be shown on a map feasibly, it may be omitted.

[fol. 374]

EXHIBIT C-1 TO EXHIBIT "C"

AGREEMENT made this 18th day of August, 1955, between Kenneth Nelson of Manchester, Connecticut; Gilbertville Trucking Co., Inc., a corporation duly authorized by law and having a principal place of business at Gilbertville, Massachusetts; and The L. Nelson & Sons Transportation Company, a corporation duly authorized by law and having its principal place of business in Ellington, Connecticut.

WITNESSETH:

WHEREAS, Gilbertville Trucking Co., Inc. (hereinafter called Gilbertville) is engaged in the motor transportation business by virtue of Certificate of Public Convenience and Necessity No. MC 87431 and subs thereunder, issued by the Interstate Commerce Commission; and

WHEREAS, said Gilbertville has outstanding only one class of capital stock of a total amount of 100 shares, common stock, without par value; and

WHEREAS, Kenneth Nelson (hereinafter called Stockholder) is the owner or controls all of said stock of Gilbertville; and

WHEREAS, The L. Nelson & Sons Transportation Company (hereinafter called Nelson) is also engaged in the motor transportation business conducting operations by virtue of Certificate of Public Convenience and Necessity No. 42871 and Subs thereunder, issued by the Interstate Commerce Commission; and

WHEREAS, the parties hereto mutually desire to merge the motor transportation business of Gilbertville and Nelson,

NOW THEREFORE, in consideration of the mutual covenants and agreements of the parties hereto, and in further consideration of One dollar (\$1.00) paid by each of the parties to the other, the receipt whereof is hereby acknowledged, the parties hereto agree as follows:

1. On or within 60 days after the effective date of the final order of the Interstate Commerce Commission approving and authorizing this transaction the stockholder shall transfer, assign and deliver to Nelson all of the common stock of Gilbertville, (namely 100 shares), representing all of the issued and outstanding stock of said corporation. As full consideration for said one hundred (100) shares of stock, the stockholder agrees to accept and Nelson agrees to transfer and deliver to the stockholder so many shares of stock of Nelson as may be due him based on the then net book value of Nelson and Gilbertville, respectively, after providing for Federal and State corporation taxes as of the date of consummation, computed in accordance with generally accepted accounting principles. It is recognized and acknowledged by the parties that the net book value of each share of the 500 shares outstanding of Nelson as of May 31, 1955 was \$303.47, whereas the book value of each of the 100 shares of Gilbertville as of said date was \$256.28 per share. Thus if the transaction were consummated as of May 31, 1955 in order for the stockholder to receive equity for the \$25,627.94 net book value of the stock of Gilbertville as contemplated by this agreement, the 100 shares of stock of Gilbertville would be exchanged for 85 shares of Nelson stock, as more fully set forth in the appendix attached hereto.

2. Recognizing that in order to carry out the terms of this agreement it will be necessary to increase the present authorized capital of Nelson (now fixed at 500 shares at \$100 par value per share or \$50,000), Nelson stipulates and agrees as soon as practical after approval of this transaction by the Interstate Commerce Commission and the determination as to the number of shares of its capital stock which may be due the stockholder in exchange for Gilbertville stock to seek authorization from the proper authorities for an increase in its capital stock to carry out the terms of this agreement.

3. The parties hereto agree to cooperate in promptly filing and diligently prosecuting all necessary applications seeking approval and authorization from the Interstate

Commerce Commission and other regulatory bodies having jurisdiction.

4. Each of the parties hereto shall be permitted to make such audits of the books and accountants of either Nelson or Gilbertville as may be necessary or advisable in making a proper computation as to value of the stock of the respective companies.

5. Should the Interstate Commerce Commission issue an order approving and authorizing the transaction here proposed, subject to conditions or limitations which vary or alter the terms or provisions of this agreement, or as a condition of its order of approval require cancellation or elimination of any part or the whole of the Certificate of Public Convenience and Necessity issued to either Nelson or Gilbertville, then and in that event only, the party or parties hereto whose rights are diminished or whose obligations are increased by said order, may terminate this agreement and all of the rights and obligations of the parties hereto shall become null and void. Provided, however, that the party or parties whose rights are diminished or whose obligations are increased thereby shall give to the other party written notice of their intention to elect to have the said agreement become null and void and the reason therefor, said notice to be sent registered mail, postage prepaid, not later than ten (10) days after receipt of the final order of the Interstate Commerce Commission setting forth such conditions or limitations, otherwise, the conditions or limitations contained in such order shall constitute a modification of this agreement, which shall, as modified by the order of the Interstate Commerce Commission, be and remain in full force and effect.

6. Gilbertville hereby consents to the terms and conditions of this agreement and does hereby agree to cooperate in the preparation and filing of the application for merger of the properties of Gilbertville and Nelson.

7. This agreement contains the entire agreement between the parties, and there are no other agreements or understandings between the parties with respect to the subject matter involved in this transaction, and this agreement can-

A. Yes. It was immediately found that it was practically impossible for Gilbertville Trucking Company, Incorporated, to secure any financing arrangements from banks or other financial institutions and the working capital has always been very low.

Exam. Baumgartner: Well, Mr. Solomon, are you telling us now, in answer to that last question, what were your activities in connection with these negotiations?

The Witness: Yes.

Exam. Baumgartner: That is what she is asking you.

The Witness: That's right.

Exam. Baumgartner: What were your activities in connection with these negotiations? Either state what you did—

The Witness: Don't state what I did?

Exam. Baumgartner: I say: state what you did, what did your activities consist of?

The Witness: I advised—early in 1954 I advised Kenneth Nelson that he—

Exam. Baumgartner: Don't tell what you advised him, now. You advised him in response to his request, is that right?

The Witness: No.

Exam. Baumgartner: What?

The Witness: No. It was my request.

Exam. Baumgartner: You requested—

[fol. 89] By Miss Kelley:

Q. You volunteered advice, is that it?

A. That's right, as an accountant. Of course, our credit was precarious.

Mr. Keenan: We have no objection, sir, to learning what advice he gave the management.

Exam. Baumgartner: All right, I will permit the witness to go on. I shouldn't have interjected myself at this point. Go ahead, Mr. Witness.

The Witness: I advised Kenneth Nelson in order to strengthen his financial means of the corporation, since he could not secure any further monies as an individual or—

[fol. 90] Exam. Baumgartner: I think we should get into the record what was the condition of the company from the financial standpoint before you as an expert can express an opinion for the record.

The Witness: Yes.

Exam. Baumgartner: If you expressed an opinion to Kenneth Nelson, that is something else.

The Witness: When Kenneth Nelson purchased the stock on March 1, 1953, the corporation had a deficit of \$39,868.34. The assets, as of December 31, 1953, was \$69,383.39.

Mr. Keenan: What was that figure?

Exam. Baumgartner: How much did you say, Mr. Solomon, I missed that?

The Witness: The assets of the corporation on December 31, 1953, was \$69,383.39; liabilities of \$50,447.82; leaving a net worth of \$18,935.57.

By Miss Kelley:

Q. Would you go on with your answer as to what that had to do with your recommendation?

A. Well, Kenneth Nelson wanted to borrow sums of [fol. 91] money for the corporation and the corporation had a poor credit standing.

Q. Did you participate in those efforts to borrow money?

A. No.

Q. Do you know whether he was successful or unsuccessful in his efforts?

Mr. Keenan: Objection. I believe that the witness should be led to state what if any sources of information he has concerning such a thing before a question like that is posed to him. It invites the witness to say: Yes, I knew, and such and such happened.

Exam. Baumgartner: Well, we can stop him when he says: yes, I knew, and ask him how he knew.

Mr. Keenan: Very well, sir.

The Witness: Kenneth Nelson—

Mr. Keenan: Objection. The witness is not going to say: yes, I knew.

Exam. Baumgartner: Just a moment. We'll find out here.

The Witness: Kenneth Nelson usually asked me regarding any financing he should do.

Exam. Baumgartner: Yes?

The Witness: And I did know that he went to the First National Bank of Manchester—

Mr. Keenan: Objection.

Exam. Baumgartner: All right. How did you know that, Mr. Solomon?

[fol. 92] The Witness: Because I advised him to go to the First National Bank in Manchester.

Exam. Baumgartner: How do you know whether he went or not?

The Witness: He told me so.

Mr. Barrett: I object.

Exam. Baumgartner: I sustain the objection.

By Miss Kelley:

Q. If Mr. Kenneth Nelson had been successful in obtaining loans, as their accountant would you have known?

A. I certainly would have.

Q. And how would you have gained that information?

A. By the books and records of the corporation.

Mr. Barrett: Now may I interject here, Mr. Examiner. There is a broad question. Mr. Nelson might have gone out and taken a personal loan for furniture, or something. I presume the question is directed to the corporation.

Miss Kelley: To the corporation, yes; and if I didn't so restrict it, it was my intention to, Mr. Barrett.

Mr. Barrett: Do I understand your answer is restricted to the corporation finances?

The Witness: That's correct, sir.

By Miss Kelley:

Q. Now you can proceed with your answer to my previous question, Mr. Solomon, with respect to what part you played in the negotiation of the transaction between Gilbertville and Nelson.

A. Early in 1954 I advised Kenneth Nelson to seek a [fol. 93] merger with Nelsons—

Exam. Baumgartner: With—

The Witness: The Nelsons and Sons Transportation Company—

Exam. Baumgartner: Just a moment. Will you read that answer, please.

[The answer was read as follows: "Early in 1954 I advised Kenneth Nelson to seek a merger with Nelsons—"]

The Witness: The Nelson and Sons Transportation Company.

By Miss Kelley:

Q. After the first advice, did you take any further part or further action with respect to the matter?

A. I continually recommended to Kenneth and I advised him to speak to Miss Kelley regarding a merger with Nelsons, and I understand Miss Kelley had recommended—

Mr. Keenan: Objection.

The Witness: —however, for different reasons.

Mr. Keenan: To what the witness understood Miss Kelley did, unless we get a little more concrete—

Exam. Baumgartner: Objection sustained.

By Miss Kelley:

Q. Now, with regard to your understanding with respect to me, will you tell what you did then and approximately when it was done?

A. Yes. I then spoke to Charles Chilberg of Nelsons about the possibility of merging.

Q. Do you know when that was, or approximately when you talked to him?

[fol. 94] A. Yes. It would be about April of 1954.

Q. Then did you take part in arriving at any determination with respect to the consideration that was to be involved in the transaction?

A. I did.

[fol. 101] . . . By Miss Kelley:

Q. Mr. Solomon, does Exhibit 9 portray the computation that you have made as to the shares of The L. Nelson and Sons Company stock to which Kenneth Nelson would be entitled to if the Commission approved this transaction?

A. That is correct.

Q. And, for the record, will you tell us how many shares that would result in, based on the computation, as of July 31, 1956?

A. Kenneth Nelson would receive seventy-eight shares of The L. Nelson and Sons capital stock.

Q. Now, under the terms of the agreement, as of what date will the computation be made to determine the exact number of shares which he would receive?

A. As of the date the merger is approved.

Exam. Baumgartner: There will be a recomputation at that time?

[fol. 102] The Witness: That's right, sir.

Mr. Keenan: Mr. Examiner, I presume the witness means approved by a final order of the Interstate Commerce Commission?

The Witness: That is correct.

Exam. Baumgartner: Now, just a moment. Exhibit No. 9 for identification is similar to the exhibits that were attached to Exhibit C-1 of the application, except that Exhibit 9 for identification relates to a later date?

The Witness: That's right, sir.

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[fol. 143] SANOL J. SOLOMON resumed his testimony as follows:

Cross examination.

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[fol. 144] Q. Mr. Solomon, how long have you worked for The L. Nelson and Sons Transportation Company as accountant?

A. Since January of 1949.

Q. And what sort of arrangement do you have? Are you a salaried employee?

A. No, sir; I am an independent public accountant.

Q. You work as an independent contractor?

A. Yes, sir; that's right, sir.

Q. How much of your working time do you devote to the affairs of this company?

A. My working time?

Q. Yes, sir.

A. Well, outside of my staff—are you referring to, or just myself?

Q. Well, do you employ others?

[fol. 145] A. Several others.

Q. Who also work for the company?

A. No, I am the only one who goes there of our company.

Q. Well, can you give us a rough estimate of how much time you spend there?

A. Yes.

Miss Kelley: I object because I don't think it is clear. Mr. Mueller, is it your position you are only interested in the number of hours that Mr. Solomon spends himself on The L. Nelson work, or where he employs his staff as a public accountant, and his staff do the work?

Mr. Mueller: I am interested in anything which will enlighten us on the subject, whether it is he or whether it is his employees.

Miss Kelley: I didn't think your question was clear as to just what you expected.

The Witness: By length of time, are you referring to the percentage of my working time or to—

By Mr. Mueller:

Q. How many days a week do you spend at The L. Nelson Transportation Company?

A. It will be about three to five days a month.

Exam. Baumgartner: Is that of your own personal time?

The Witness: That's right, sir.

By Mr. Mueller:

Q. Do you have employees who also devote time to the affairs of this company?

[fol. 146] A. No, they would be the office employees only.

Q. Well, now, that isn't clear to me.

A. My office employees—in other words, I do the audit and there are certain mechanical functions of accounting that is taken care of by my office.

Q. And that is done in your office?

A. That's right, sir.

Q. And not at the premises of The L. Nelson Transportation Company?

A. That's right.

Q. Do you also devote time to the affairs of Gilbertville Trucking Company?

A. Yes, I do. When I made that statement I meant for all of them together, three to five days a month.

Q. Can you divide that up for us?

A. Yes, very easily.

Q. How much time is devoted to Gilbertville and how much time is devoted to L. Nelson?

A. I would say two days a month to Nelson and a day a month to Gilbertville.

Q. Well, now, what is your arrangement with the Gilbertville Company? Are you again an independent contractor?

A. Yes, sir.

Q. When did you begin working for Gilbertville as an accountant?

A. At the same time Kenneth Nelson assumed control of [fol. 147] the capital stock, which is March 1st of 1953.

Q. Where are the Gilbertville records kept?

A. The Gilbertville records are kept in Ellington, or you may call it Rockville.

Q. Are those records under your jurisdiction?

A. They are.

Q. What sort of records are they that are under your jurisdiction there at Ellington, or Rockville?

A. It would be the same as any other motor carrier's. It has the various journals and ledgers and supporting schedules.

Q. And are those records housed together with the records of The L. Nelson Transportation Company?

Miss Kelley: I object to the question.

Exam. Baumgartner: On what ground?

Miss Kelley: The form of the question: are they housed together. I don't know what is meant by that term.

Exam. Baumgartner: What was the question?

Mr. Mueller: I asked him whether the records were housed together with The L. Nelson Transportation Company.

Miss Kelley: I object to the term—

Mr. Mueller: Are they under the same roof?

Miss Kelley: Whether they are under the same roof or not is immaterial.

Exam. Baumgartner: This is cross-examination. Miss Kelley. I think he has a right to make an inquiry along that [fol. 148] line: as to where the records are from which he gained the knowledge which enabled him to testify on direct examination.

The Witness: Some of the records are in a large safe that would have some of the records of Nelson's in it.

By Mr. Mueller:

Q. Where is that safe located?

A. At 25 West Road, Ellington, Connecticut.

Q. Can you describe those premises for us?

A. Yes. It is a two-story frame building, originally put up, probably, as a cottage; and the second floor is devoted entirely to Gilbertville Trucking Company. The first floor is devoted to Nelson's.

Q. Would you have to go through the Nelson terminal premises to get to the Gilbertville office?

A. That's right, sir.

Exam. Baumgartner: Is this terminal premises?

The Witness: Not terminal—you are referring to the office, I believe, weren't you?

Q. Office: premises.

A. Office premises.

Q. Is that facility also used as a terminal at Ellington?

A. The separate building in the back would be the terminal.

Q. It is used by Gilbertville and Nelson, yes.

Q. Both carriers use the premises?

A. To my knowledge, yes.

Q. Do you know whether records of Gilbertville are maintained anywhere else?

A. No. The main records are kept in the Gilbertville office, which is located in Ellington.

Q. Are there any kept at Ware, Massachusetts?

Miss Kelley: I can't hear your question.

Q. Are there any kept at Ware, Massachusetts?

A. No, none, I believe. I don't—

Exam. Baumgartner: Well, do you know?

The Witness: There is no terminal at Ware, Massachusetts, so there can't be any records kept there, I believe.

By Mr. Mueller:

Q. Do you know where the Gilbertville terminals are located?

A. Yes, I do.

Q. Will you designate the points?

A. Yes, sir. Gilbertville, Massachusetts; Ellington, Connecticut; Woonsocket, Rhode Island; Newton, Massachusetts; and New York City, New York.

[fol. 152] By Mr. Mueller:

Q. Is the so-called Gilbertville terminal of the Gilbertville Trucking Company located at the Ware, Massachusetts, Airport?

A. I wouldn't know that it is located there.

Q. There is a terminal which is known as the Gilbertville terminal?

A. Yes, sir.

Q. Up in Massachusetts?

A. Gilbertville, Massachusetts.

Q. Gilbertville?

A. Yes, sir.

Q. Now on direct examination, Mr. Solomon, you stated that you consult frequently with Charles G. Chilberg, [fol. 153] president of L. Nelson and Sons. Have you ever seen Kenneth A. H. Nelson on the premises of The L. Nelson Transportation Company at Ellington, Connecticut?

A. In order to reach the Gilbertville offices, Kenneth Nelson would be on the premises of Nelson's.

[fol. 155] [The question was read by the reporter as follows: "Have you at any time since Kenneth A. H. Nelson purchased the Gilbertville stock consulted with him about the affairs of The L. Nelson Transportation Company?"]

Mr. Mueller: I submit, Mr. Examiner, it is perfectly proper.

Exam. Baumgartner: He is going to answer the question.

The Witness: Consulted with who? Be specific.

By Mr. Mueller:

Q. Kenneth Nelson?

A. Kenneth Nelson?

Q. Concerning the affairs of The L. Nelson Transportation Company?

A. Ever since—for the merger, yes, sir.

Miss Kelley: Has it been with relation to matters having to do with the preparation for this proceeding, or the application?

The Witness: That is correct.

By Mr. Mueller:

Q. You have consulted with him at no time concerning matters pertaining to operations or financing?

A. That is right.

Q. Of the L. Nelson Transportation Company?

[fol. 156] A. That's right.

Q. Your only consultations have been with respect to the filing of this application?

A. That's right, sir.

Q. Referring now, Mr. Solomon, to January of 1953, when, you said on direct examination, you were asked to determine the feasibility of a purchase of the Gilbertville stock, who asked you—

A. Yes, sir.

Q. —to make this determination?

A. I was in the hospital at the time, and I have a letter sent to me by Kenneth Nelson.

Exam. Baumgartner: You were where at the time? I didn't get that.

The Witness: I was in the hospital at the time, and I have a letter here that was sent to me by Kenneth Nelson. I have the letter, if you want me to read it.

[fol. 158] By Mr. Mueller:

Q. Now you say, Mr. Solomon, that this request was addressed to you by whom?

A. By Kenneth Nelson.

Q. In the form of a letter?

A. Yes, sir.

Q. On its receipt what did you do?

A. Well, it was some time later, probably two weeks later, that I was able to audit the books and records of Gilbertville at—

Q. Where did you do that?

A. Yes; at Springfield, Massachusetts, in the office of the accountant Mahoney.

Q. Now, I believe you said that—

A. Francis J. Mahoney.

Q. —you had a conference with an attorney named Paroshinsky and another man named Zanden?

A. That's right, sir.

Q. And Mr. Mahoney. When and where did that conference—

[fol. 159] A. Yes.

Q. —occur?

A. Yes. It took place on July 24, 1953, with the final closing about—it was at the office that is held jointly by Attorney Samuel Zanden—z-a-n-d-e-n—who is attorney for Mr. Vachon the seller of the stock and the—it's a joint

office with Francis J. Mahoney, the accountant for Vachon, and prior to that to the Gilbertville Trucking Company. It's located at 31 Elm Street, Springfield, Massachusetts.

Q. Were you alone with these three men?

A. No, at that time I was not alone.

Q. Who else was present?

A. Kenneth Nelson was present with me, and there would be Wilfred V. Vachon and Attorney Arthur Paroshinsky.

Q. Were any of the other Nelsons or Chilbergs there?

A. Definitely not.

Q. Was a man named Mobley present?

A. I never heard of the name before.

Q. Now, Mr. Solomon, on July 24, 1953, the date when this conference took place, were you employed as an accountant by The L. Nelson and Sons Transportation Company?

A. That is right, sir.

Q. That is, your employment was continuing through that time?

A. Yes.

Q. Now, can you recall the date of the stock transfer [fol. 160] from Vachon to Kenneth Nelson and Arthur Chilberg?

A. I'm sorry, the stock transfer from Arthur—from Kenneth Nelson—

Q. I'm sorry, the stock transfer from Vachon to Nelson and Chilberg?

A. The stock transfer from Mr. Vachon to Kenneth Nelson and Oscar Herbert Chilberg took place on July 24, 1953.

Q. It occurred, then, on the date of the transfer?

A. That's right.

Q. On the date of the conference, I'm sorry?

A. In other words, when the escrow was finally determined, the escrow fund was finally settled.

Q. Was the stock, were the stock certificates actually passed over?

A. That's right, sir.

Q. As of that date?

A. Yes, sir.

learn these facts about which you are about to testify and have been testifying in regard to the transactions?

The Witness: I did, sir.

Exam. Baumgartner: I think that qualifies him.

Mr. Keenan: Very well, I think any further questions should be postponed until cross-examination.

Exam. Baumgartner: Yes.

Mr. Keenan: Thank you, Mr. Examiner.

By Miss Kelley:

Q. Now, Mr. Solomon, will you answer my previous question, when I asked you if you would tell us the details in connection with that transaction, the consideration, and so forth?

A. The capital stock, a hundred shares, was sold for [fol. 56] \$35,000, including a note payable of \$10,000 to Wilfred J. Vachon with interest, with the first payment of \$500 to be made on August 1, 1953, and each three months thereafter, and the remaining \$25,000 was placed in cash by Kenneth Nelson, who had made a loan personally with Oscar Herbert Chilberg from the First National Bank of Manchester for a total loan to be made at that time of \$30,000. The rest of the difference of \$5,000 was put in as working capital by Kenneth Nelson.

Q. Have you completed?

A. I have.

Q. I didn't quite understand one point that you said. You said that Kenneth Nelson had made a personal loan with a bank and then—

Exam. Baumgartner: Just a moment. And gotten a loan from the bank?

Miss Kelley: Yes.

The Witness: I believe I said Kenneth Nelson and Oscar Chilberg secured a loan from the First National Bank of Manchester for \$30,000.

Exam. Baumgartner: Now, is that a personal loan?

The Witness: A personal loan, sir, that is correct.

By Miss Kelley:

Q. And were Kenneth Nelson and Oscar Chilberg co-makers of the note, if you know?

A. That is right. That is correct.

Q. Was that note secured by any property?

[fol. 57] Q. It was secured—there probably was collateral placed behind it.

Q. That is what I mean.

Exam. Baumgartner: That is what she is asking you.

Q. Do you have any knowledge of the collateral?

A. The collateral?

Q. Whether it was a secured note or not?

A. I do not have any knowledge as to what was the collateral.

Q. But you do know there was collateral?

A. That's right.

[fol. 58] By Miss Kelley:

Q. Mr. Solomon, in answer to a question of mine just before lunch, you were telling about the consideration that was paid by Kenneth Nelson for the stock of Gilbertville Trucking Company, and in discussion with some of the opposing counsel it appeared they felt the record was not clear on that point. So will you tell us again what the consideration was and how it was paid?

A. The full price is \$35,000 plus cash, good accounts receivable, pre-paid items less liabilities.

Q. Wait a minute. Now the cash, the pre-paid items, and the accounts receivable—were those the accounts receivable and the cash that were in the Gilbertville Corporation on March 1 of—what year was that—1953?

A. That's right, at the beginning of business on March 1, 1953.

Q. And Mr. Vachon, the previous stockholder of Gilbertville, was to receive a sum equivalent to those items on that date, is that correct?

A. That's right.

Q. Plus \$35,000?

[fol. 59] A. That's right.

Q. How about the liabilities of Gilbertville? Who was to assume those.

A. The liabilities were assumed by the successor corporation, Gilbertville Trucking Company under Kenneth Nelson.

Q. Did I understand you to say the accounts receivable, cash, and pre-paid items as of March 1, or a sum equal to them, were to go to Mr. Vachon, but that he had nothing to do with the liabilities which had arisen?

A. He did. That was charged against him.

Q. I'm sorry, I'm not quite clear on that.

A. All right. The full sales price is \$35,000.

Exam. Baumgartner: Now let's get this clear. That is \$35,000 to Mr. Vachon for his stock in Gilbertville Trucking Company?

The Witness: That's right, sir.

Exam. Baumgartner: He was to get \$35,000 plus accounts receivable?

The Witness: Plus any cash that the corporation had.

Exam. Baumgartner: Plus \$35,000 plus cash in the corporate till, or to its credit?

The Witness: That's right.

Exam. Baumgartner: And what is the third item?

The Witness: Accounts receivable and pre-paid items, such as registrations.

[fol. 60] Exam. Baumgartner: Now, you spoke about Mr. Vachon having something to do with the Gilbertville Trucking Company liabilities. What were you about to say about that?

The Witness: The Gilbertville Trucking Company, Incorporated, had liabilities as of the end of February 28, 1953, and that was deducted from this cash accounts receivable and pre-paid items. Still the full price is \$35,000.

Exam. Baumgartner: You mean the deduction was made before you arrived at this \$35,000 plus these other two items? The deduction was made prior to that?

The Witness: The deduction is: \$35,000—

Exam. Baumgartner: The deduction was from the \$35,000?

The Witness: From the \$35,000 for the liabilities.

Exam. Baumgartner: Oh, I see. Then he got something less than \$35,000 plus these two items?

The Witness: No. He received the full \$35,000 and he was given credit for whatever cash the corporation had in accounts receivable and pre-paid items.

Exam. Baumgartner: Less what?

The Witness: Less liabilities that the corporation had.

Exam. Baumgartner: The liabilities were offset against the accounts receivable?

The Witness: That's right, sir.

Exam. Baumgartner: And the pre-paid items?

The Witness: That's right.

[fol. 61] Exam. Baumgartner: So, I see, he got the \$35,000 in full, plus whatever balance was left of these other two items after deduction for liabilities?

The Witness: Yes. The corporation assumed all the assets and the liabilities.

By Miss Kelley:

Q. Was the sum of the liabilities less than the sum total of the cash, good accounts receivable, and the pre-paid items, or were they about even?

A. The liabilities of the corporation were greater.

Mr. Keenan: Than what?

The Witness: Than the—

By Miss Kelley:

Q. Than those assets that were in the corporation?

A. That's right.

Q. The assets consisting of accounts receivable, cash, and pre-paid items?

A. That's right.

Q. Now, you have said that Mr. Vachon was to receive the full \$35,000. Well, then, did he pay into the corporation or did he assume some of those liabilities over and above the amount of the three asset items which he was to get the benefit of?

A. Mr. Vachon on selling his stock does not assume any

of the assets, nor does he get any of the liabilities charged against him. The successor in the corporation has to pay the liabilities of the corporation.

[fol. 62] Q. But those items were taken into consideration in arriving at the consideration for the stock, is that correct?

A. Still it is \$35,000.

[fol. 64] By Miss Kelley:

Q. Mr. Solomon, have you looked at the agreement that you referred to between Kenneth Nelson and Mr. Vachon with respect to the purchase of Gilbertville stock?

A. Yes, I have.

Q. After refreshing your recollection is the testimony that you previously gave as to the consideration for that stock correct?

A. That is correct.

Exam. Baumgartner: Well, Miss Kelley, that's correct; but, certainly not clear in my mind. First he tells us that Mr. Vachon was to get \$35,000 plus cash in the company's treasury, plus pre-paid items. Then he follows that by saying minus the liabilities of the Gilbertville Trucking Company. Now, I still don't understand how much Mr. Vachon [fol. 65] received over and above these liabilities.

By Miss Kelley:

Q. Mr. Solomon, can you answer the Examiner's question?

A. Yes. Mr. Vachon's full purchase price is \$35,000.

Q. Is that the—

Exam. Baumgartner: Just a moment. This thing is very confusing. Maybe I should have studied accounting. You said a while ago Mr. Vachon was to get \$35,000 plus the cash in the company's treasury?

The Witness: The—

Exam. Baumgartner: Plus cash?

The Witness: I would say Mr. Vachon would get credit for any cash in the company's treasury as of the close of business February 28, 1953.

Exam. Baumgartner: Credit?

The Witness: Credit, meaning to—\$35,000 plus any cash in the corporation, any good accounts receivable, any pre-paid items.

Exam. Baumgartner: Now, he is to get credit for that?

The Witness: That's right.

Exam. Baumgartner: But he is to be debited with the liabilities of the company? Isn't that what you said a while ago?

The Witness: That's right, because the successor—

Exam. Baumgartner: Now, after you strike the balance, you said the liabilities were greater than these assets, [fol. 66] the cash plus pre-paid items?

The Witness: That's right.

Exam. Baumgartner: So, did Mr. Vachon receive less than \$35,000?

The Witness: He must have received less than \$35,000.

Exam. Baumgartner: That is what I am getting at. How much less, can you say?

The Witness: If you let me go through my records here I could tell you.

Exam. Baumgartner: Well, did you know at the time how much it was?

The Witness: Sure, I verified it.

Exam. Baumgartner: All right. You want to refresh your recollection, is that the point?

The Witness: Surely.

Exam. Baumgartner: All right.

The Witness: May I make one thing clear. The successor corporation assumes the liabilities.

Exam. Baumgartner: What has that got to do with Mr. Vachon after he has got the stock?

The Witness: Not with Mr. Vachon. Let's call it the corporation itself. You have to pay all the liabilities off. In other words, to Kenneth Nelson. It cost him \$35,000, no more.

Mr. Keenan: Mr. Examiner, the witness is referring to a successor corporation concerning which, as far as I know, [fol. 67] there has been no testimony heretofore.

The Witness: It's the same corporation. I'm merely saying under a new management, new stockholder.

Exam. Baumgartner: He has a little misnomered that. Do you remember what the question was?

The Witness: Yes.

Exam. Baumgartner: The question was how much did Mr. Vachon actually receive for his stock? Are you ready to answer?

The Witness: Yes.

Exam. Baumgartner: Proceed.

The Witness: The assets were \$13,000—meaning the receivables, there was no cash there—receivables, unexpired insurance and pre-paid registration—

Exam. Baumgartner: Well, Mr. Solomon, can you give us a fairly accurate estimate? We don't want it right down to pennies.

The Witness: Yes. It's around—you would come out with—

Exam. Baumgartner: Net.

The Witness: —around \$23,000.

Exam. Baumgartner: Approximately \$23,000?

The Witness: That's right, sir. The liabilities were \$14,992.36. The assets were approximately—I could give you exact figures—\$2,000.

Exam. Baumgartner: That is close enough.

Miss Kelley, pardon my interrupting your questioning, [fol. 68] but I felt I had to get this clear.

Miss Kelley: I'm sorry. Can I have that figure? I was trying to reach a stipulation with Mr. Williams. So it's \$23,000 net to Mr. Vachon, is that correct?

Exam. Baumgartner: Approximately \$23,000 net Mr. Vachon received.

Mr. Williams: Mr. Chairman, while that is being discussed, as I recall it, Mr. Solomon said something about a note to Mr. Vachon, and I wonder if that could be cleared up also at this time.

Miss Kelley: Yes.

By Miss Kelley:

Q. Can we clear up the payment—

A. The payment to get \$35,000—

Q. No. It was how Mr. Vachon received the money, or what he received?

A. He received a note from Kenneth Nelson and Oscar Herbert Chilberg—excuse me—that is correct—of \$10,000 with four percent interest with the first payment of \$500, August 1, 1953, and every three months thereafter.

Exam. Baumgartner: Now, that note went to Mr. Vachon?

The Witness: That's right, sir.

Exam. Baumgartner: In part payment of this \$23,000?

The Witness: That's right, sir.

Exam. Baumgartner: Of what did the balance consist?

The Witness: The balance consisted of cash.

[fol. 69]. Exam. Baumgartner: Cash: \$13,000, approximately?

The Witness: That's right, sir.

By Miss Kelley:

Q. And when and how was that paid? Did that go into escrow for a period of time, or was it paid right over to Mr. Vachon?

A. It went over for a period of time, until July of 1953, July 24, 1953.

Mr. Keenan: Does the witness mean to say it went into escrow?

Q. Did it go into escrow, did you say, until that date?

A. Until July 24, 1953.

Q. And what was the purpose of the cash being deposited in escrow?

A. In order to pay off, in order to make certain of these liabilities.

Exam. Baumgartner: In order to be sure that the liabilities would be liquidated first?

The Witness: That's right.

By Miss Kelley:

Q. What other assets or tangible assets, first, did the Gilbertville Trucking Company have at that time?

A. They had eight trucks, tractors, and trailers all together.

Q. Can you tell me how many trucks—

Mr. Keenan: Excuse me, Mr. Examiner. Counsel has asked what other assets did the Gilbertville Trucking Company have, and I don't know with relation to what she is using the word "other." Other than what?

[fol. 70] Exam. Baumgartner: Other than the cash in the company's account we have been talking about.

Mr. Keenan: Is that the \$13,000 to which the witness has testified so far?

Exam. Baumgartner: No. That is the amount of money Mr. Vachon—

Mr. Keenan: My notes don't reflect the amount of cash in the company's accounts. That is the reason I asked.

Exam. Baumgartner: That hasn't been mentioned yet. I don't think it has. Did you say—

The Witness: I did say there was no cash left in the corporation.

Exam. Baumgartner: I see.

Mr. Joseloff: He said about \$2,000 in receivables and pre-payments.

Exam. Baumgartner: That's it. Now we are talking about assets other than this \$2,000 item for receivables.

Mr. Keenan: Thank you, Mr. Examiner.

By Miss Kelley:

Q. Can you tell me how many of those eight items were trucks? How many tractors and trailers?

A. Yes, I can. One straight truck, three tractors and four trailers.

Q. Do you have knowledge as to whether or not they were registered and operating on March 1, 1953?

A. I believe I would. According to this purchase agreement [fol. 71] it calls it rolling stock.

[fol. 78] Q. Have you acted as the public accountant for Gilbertville Trucking Company since March of 1953?

A. I have.

Q. Now, since that time, March of 1953, who were the

officers and directors of Gilbertville Trucking Company and the stockholders?

A. When Kenneth Nelson on March 1, 1953, took over the capital stock he was president and treasurer. Oscar Herbert Chilberg—I'm sorry. Kenneth Nelson was merely president. Oscar Herbert Chilberg was the treasurer.

Exam. Baumgartner: In what year, now?

The Witness: March 1, 1953.

Q. Do you have the other officers and directors at that time?

A. The only other officer at that time was attorney Arthur Paroshinsky.

Q. Were there three directors?

[fol. 79] A. Three of them were directors.

Q. Who held the stock at that time: March 1, 1953?

A. Kenneth Nelson, Oscar Herbert Chilberg, and Attorney Paroshinsky.

Q. How many shares were held by each?

A. Kenneth Nelson had fifty-one shares; Oscar Herbert Chilberg, fifty-one shares; and Attorney Paroshinsky, one share, for a total of 100 shares.

Exam. Baumgartner: Now, in what corporation?

The Witness: Gilbertville Trucking Company, Incorporated.

Exam. Baumgartner: Only a hundred shares altogether?

The Witness: That's right, sir.

Exam. Baumgartner: Where was the other—oh, fifty; yes, I see.

By Miss Kelley:

Q. At some time after March of 1953 was there a change in the stockholders of the Gilbertville Trucking Company?

A. Yes. In 1954 Oscar Chilberg resigned as treasurer.

Mr. Barrett: When in 1953, if you don't mind, while you're at it?

The Witness: I don't have the date available right now.

Exam. Baumgartner: Can you give us the approximate date?

Miss Kelley: To save time, if the opposition would accept it, I have that date as January 19, 1954.

Exam. Baumgartner: When?

[fol. 80] Miss Kelley: January 19, 1954.

Exam. Baumgartner: Any objection to Miss Kelley's statement?

Mr. Keenan: Anything Miss Kelley assures us is true, why, we will—

By Miss Kelley:

Q. Does that refresh your recollection?

A. That's right, either January or February of '54.

Q. And did Oscar Chilberg sell his stock in the Gilbertville Trucking Company at that time?

A. He sold it to Kenneth Nelson.

Q. And thereafter who were the stockholders?

A. Kenneth Nelson, fifty-one shares; his wife Phyllis Nelson, twenty-four shares; John Kashady—who is supervisor of the Gilbertville terminal—twenty-four shares; then for the hundredth shares, that is still Arthur Paroshinsky, Clerk, one share.

Mr. Keenan: Mr. Examiner, I fail to note how many shares Phyllis Nelson had.

Miss Kelley: Twenty-four shares.

Mr. Keenan: Thank you kindly.

By Miss Kelley:

Q. Do you have knowledge as to the arrangement with John Kashady as the registered holder of the stock?

A. Yes.

Q. Did he purchase the stock?

A. No—

Mr. Keenan: Objection unless the sources of such knowledge [fol. 81] are explained.

By Miss Kelley:

Q. Will you tell us the sources of your knowledge?

A. Yes. Kenneth Nelson had spoken to me about it

were possible to give twenty-four shares to John Kashady in order for John Kashady to have prestige in his job of supervisor of the Gilbertville terminal?

Exam. Baumgartner: What was your question, Miss Kelley, that preceded this last?

Miss Kelley: Could we have it read back?

[The question was read as follows: "Will you tell us the sources of your knowledge?"]

Mr. Keenan: My objection remains, because the witness has not stated in a manner which I can understand what the sources of his information, of his knowledge, is. In other words, did Kenneth Nelson tell him?

The Witness: I'm sorry, the stock transfer book and the—you asked for consideration?

Exam. Baumgartner: No. He is asking you how you came to know what you have been asked about—

The Witness: That's right.

Exam. Baumgartner: —the stock transfer book and the minute book of the corporation, which you examined?

The Witness: That's right, sir.

Mr. Keenan: Mr. Examiner, could the witness be instructed to just simply tell us what is in the book, rather than telling us a lot of other facts?

Exam. Baumgartner: If we try to observe all the niceties we are not going to get through here in the next ten years.

Mr. Keenan: I agree. Could I make it plain, Mr. Examiner, that I don't want to be obstructive. I just want to be able to competently examine the witness, Mr. Examiner, as to what he got in on direct.

Exam. Baumgartner: You can examine him on the basis of what the books show.

Mr. Keenan: If he got it on the basis of what somebody else said—

Exam. Baumgartner: You can object, then, and move that it be stricken.

Mr. Keenan: Of course, that is correct.

Miss Kelley: I believe the question is still pending.

Q. Did you complete your answer?

A. I think I did.

Exam. Baumgartner: I thought he completed it.

By Miss Kelley:

Q. At January 19, 1954, who had been the officers of Gilbertville Trucking Company?

A. January 19, 1954?

Q. Yes, when Oscar Chilberg resigned as the treasurer.

A. Kenneth Nelson, president and treasurer, and Arthur Paroshinsky as clerk, and the above two plus Phyllis Nelson [fol. 83] and John Kashady as directors.

Exam. Baumgartner: How many were directors?

The Witness: Four altogether.

Exam. Baumgartner: Four?

The Witness: Four.

Exam. Baumgartner: That was Phyllis—

The Witness: Phyllis Nelson, Kenneth Nelson, John Kashady, and Arthur Paroshinsky.

By Miss Kelley:

Q. That is Phyllis Nelson, I believe you already said, is the wife of Kenneth Nelson?

A. That's right.

Q. And Arthur Paroshinsky is the attorney—

A. Arthur Paroshinsky is the attorney.

Q. In connection with the affairs of Gilbertville Trucking Company, financial matters, who did you discuss such matters with?

A. Only with Kenneth Nelson.

Q. And—

• • • • •

[fol. 84] By Miss Kelley:

Q. Mr. Solomon, were the financial exhibits, namely, Exhibit B-4, a balance sheet statement of the Gilbertville Trucking Company as of May 31, 1955, and the operating statements, Exhibit B-6, which covers a period of January 1, 1955, to May 31, 1955, and Exhibit B-6(3), being the operating statement of Gilbertville Trucking Company from January 1, 1953, to December 31, 1953, prepared by you?

A. They were. Incidentally, I had a copy here before, but it's not here now. May I have a copy?

Q. I guess I have your copy. I'm sorry.

A. Thank you.

/

[fol. 87] Q. Are you familiar with the terms of the agreement between the parties, the terms involved in the proposed merger of Gilbertville and Nelson?

A. I am.

Q. And under that agreement it is proposed to—

Exam. Baumgartner: Miss Kelley, I am afraid you are going to have an objection here unless he tells us how he became familiar with the matter.

By Miss Kelley:

Q. Mr. Solomon, did you have any part in the negotiations in connection with the proposed merger of Gilbertville and Nelson?

Mr. Keenan: Objection, and I request that counsel be instructed not to lead the witness.

Exam. Baumgartner: This is preliminary, Mr. Keenan. I think she is entitled to ask him leading questions preliminarily.

Mr. Keenan: Yes, sir; there have been in my opinion—I respectfully say—a number of leading questions thus far, and I have thought I had better start to state my opinion of them as they come up.

Exam. Baumgartner: I realize they are leading, but counsel get into that once in a while.

By Miss Kelley:

Q. Would you give me an answer, Mr. Solomon. Did you have part in the negotiations, or did you—

A. Yes, I did.

Q. And will you tell us what your activities were?

[fol. 88] A. Yes.

Q. Prior to negotiating the agreement between these parties?

Q. I said July.

A. It's June 30, I'm sorry.

Exam. Baumgartner: The correct date is June 30, 1951, is that right?

The Witness: That is correct.

Q. When the shares held by Oscar were sold to Charles Chilberg?

A. That's right.

[fol. 34] Q. Up to June 30, 1951, Oscar Chilberg had been an officer and director, I believe you testified, of The L. Nelson and Sons Company?

A. That is right.

Q. And up to September 22, 1951, Kenneth Nelson had been an officer and director of The L. Nelson and Sons Company?

A. He was. That's correct.

Q. Now, with the sale of their stock was there a change in so far as the officers and directors were concerned?

A. On the sale of their stock?

Q. Yes. On the sale of their original shares, did they continue on as officers and directors of The L. Nelson Company?

A. Oh, no. It just remained with the estate, Charles Chilberg and Clifford Nelson.

Q. So that after those two dates, namely, June 30, 1951, and September 22, 1951, Oscar Chilberg and Clifford Nelson were no longer officers or directors of L. Nelson and Sons Company?

A. That is correct.

Miss Kelley: Did I say Kenneth Nelson there?

Mr. Keenan: Yes. You meant Clifford, correct?

Mr. Williams: No.

Miss Kelley: No.

Mr. Joseloff: She meant Clifford—

Exam. Baumgartner: Read the question back, Miss Reporter, please.

[fol. 35] [The question was read by the reporter as follows: "So that after those two dates, namely, June 30, 1951,

and September 22, 1951, Oscar Chilberg and Clifford were no longer officers or directors of L. Nelson and Sons Company?"]

Miss Kelley: Strike that. I'll ask him:

Q. If Oscar Chilberg and Kenneth Nelson were no longer directors?

A. That's right.

Q. And have either of them, Oscar Chilberg or Kenneth Nelson, been officers or directors of The L. Nelson and Sons Company since that time?

A. No, they have not been.

Mr. Keenan: Again, if the Examiner please, I don't know what the time is that counsel refers to. I can guess it, but it is not precise on the record.

Exam. Baumgartner: I think it is pretty plain that we are talking about the period between June 30, '51, and September 22, 1951.

Miss Kelley: And the present date.

Exam. Baumgartner: Am I correct?

Miss Kelley: Between June 30, 1951-September 22, 1951, on the one hand, and the present time, on the other.

Mr. Keenan: With respect to whom? With respect to Kenneth Nelson?

Miss Kelley: To both Kenneth Nelson and Oscar Chilberg.

[fol. 36] Mr. Keenan: You see where the confusion exists, because Kenneth Nelson is reflected on the record as being an officer between June 30 and September 22. That is the reason I ask for clarification, if the Examiner cares to inquire.

Exam. Baumgartner: Well, is it clear of record now that these two sellers of shares of stock that we have just been speaking about ceased to be officers and directors at the time of the sale of the stock, and have not since been officers or directors of L. Nelson and Company?

By Miss Kelley:

Q. Is that correct, Mr. Solomon?

A. That is correct.

Mr. Keenan: And finally, Mr. Examiner, could I inquire whether that is correct with respect to Oscar Chilberg from the date June 30, 1951, and with respect to Kenneth Nelson from the date September 21, 1951, in each case, until the present date?

The Witness: That is correct.

Mr. Keenan: Thank you.

The Witness: September 22, for the record.

By Miss Kelley:

Q. During the summer of 1951, did a third member of the family sever his connection with L. Nelson and Sons Company, of the Nelson-Chilberg family?

A. During the summer of 1951, Howard Chilberg left the employ of the company.

Mr. Keenan: Mr. Examiner, may the record reflect that the witness is referring to a memorandum with which to refresh his recollection in giving his testimony, and may [fol. 37] the record note my desire at a time that meets counsel's convenience to examine that memorandum myself?

Exam. Baumgartner: The record may so show.

By Miss Kelley:

Q. Mr. Solomon, do you have knowledge as to when the members of the Nelson-Chilberg family negotiated for the sale of stock which they inherited under their mother's will?

A. Yes, I do.

Q. Will you tell us about that?

A. January—you want the sale of stock, of the inherited stock?

Q. I want to know if you know when they arranged for the sale of the stock and then when it was actually sold?

A. Yes. When Herbert Chilberg sold his share of stock in June of '51, he also arranged that when he would receive his forty-two shares that the estate then held, the stock would be sold to Charles Chilberg.

Mr. Keenan: Mr. Examiner, again for clarification, may I inquire if when the witness refers to Herbert Chilberg, he is referring to Oscar—

Miss Kelley: I will straighten these things out if you will just give me an opportunity, and I think we will get along faster.

Mr. Keenan: May I finish, Mr. Examiner? May I inquire for clarification whether when the witness is referring to Herbert Chilberg he means to designate someone previously identified as Oscar Herbert Chilberg?

[fol 38] Exam. Baumgartner: I was about to ask him the same question.

Miss Kelley: And so was I, Mr. Examiner, for clarification.

The Witness: I'm sorry.

Exam. Baumgartner: Your answer is yes?

The Witness: Oscar Herbert Chilberg is correct.

By Miss Kelley:

Q. Had you finished your answer, Mr. Solomon?

A. No, I have not. And Kenneth Nelson, when he left the employ of the company on September 22, 1951, when he sold his fifty shares, had arranged to sell the forty-two shares he would receive from the estate.

Q. Now, do you have knowledge as to when other members of the family arranged to sell their shares, shares inherited under the will?

A. Yes. Do you desire the dates?

Q. If you have them.

A. Yes. Howard, who had left during the summer of 1951, had arranged to have his forty-two shares sold when he was to get it from the estate.

Mr. Keenan: Could I hear again the date when Howard left?

The Witness: Howard left in the summer of 1951.

Mr. Keenan: And again, for clarification, Mr. Examiner, could I inquire what office Howard held? I ask this because my notes do not reflect that Howard held any office with the corporation.

Exam. Baumgartner: The testimony was simply that he [fol. 39] left the employ of the company.

Mr. Keenan: Thank you, sir.

Exam. Baumgartner: He was not an officer?

The Witness: That's right, sir.

Exam. Baumgartner: What position did he hold?

The Witness: Office manager.

Exam. Baumgartner: Office manager?

The Witness: Yes, sir.

By Miss Kelley:

Q. And did Kenneth Nelson and Oscar Chilberg continue as employees of The L. Nelson and Sons Company after each of them sold their original shares of stock?

A. No, they did not.

Q. Now, I don't know whether you have already given us the date when the stock that was received under the will of their mother was released by the executors?

A. The stock was released on January 24, 1953, and Kenneth Nelson sold his forty-two shares to Clifford Nelson. Oscar Chilberg sold his forty-two shares on January 24, 1953, to Charles Chilberg. Howard Nelson—I'm sorry, his name is Howard Chilberg, sold his forty-two shares on February 28, 1953.

Mr. Keenan: Who sold what on February 28?

The Witness: Howard Chilberg.

Mr. Keenan: Mr. Examiner, I don't know what was sold and to whom, I'm sorry, but I find it difficult to keep notes.

Exam. Baumgartner: Howard sold his forty-two shares. [fol. 40] Mr. Joseloff: To whom?

Exam. Baumgartner: To whom, Mr. Witness?

The Witness: Howard Chilberg sold his forty-two shares to Charles Chilberg.

Exam. Baumgartner: At what time, what date?

The Witness: February 28, 1953.

By Miss Kelley:

Q. Do you have the dates and names of other persons—

A. What is that?

Q. Do you have the names and dates when other members of the family sold the shares that they inherited?

A. Yes, I have. Ruth Nelson Widham at that time remarried, and her name was Nyberg—n-y-b-e-r-g—and sold her shares from the estate in February, 1953.

Mr. Joseloff: To whom?

The Witness: To Clifford Nelson.

By Miss Kelley:

Q. Were there other sales by the heirs?

A. Other sales by the heirs, no, there were no other sales.

Q. Do you have a copy of the application before you?

A. Yes, I have.

Q. In the finance case, will you refer to Page 5, and tell me, as shown on Page 5, if the officers and directors of L. Nelson and Sons Company are the same at the present time as they were at the time the application was submitted.

A. That is correct. The present officers are the three [fol. 41] indicated on Page 5.

Q. And for the record will you give us their names and titles?

A. Charles Chilberg, president and treasurer; Clifford Nelson, secretary and assistant treasurer; and Greta C. Nelson Carlson, vice-president.

Q. Are those three the directors of the company as shown on Page 5 of the application?

A. The same three are the directors.

Q. Now, can you tell us how long those parties have been officers and directors of L. Nelson and Sons Company?

A. Ever since the estate was closed on December 31, 1952.

Q. During the pendency of the estate and after the death of Mrs. Nelson, was a president and treasurer elected?

A. No.

Q. Did the vice-president and the assistant treasurer carry on in her stead?

A. That is correct.

Q. On Page 5 of the application, under stockholders, the principal stockholders requested, and there are reflected the stockholdings of Charles Chilberg and Clifford Nelson.

does that correctly reflect the number of shares held by each at the present time?

A. That is correct.

Q. And have each of them held that number of shares, same number of shares, since the purchases from the other [fol. 42] members of the family?

A. That is right.

Q. Greta Carlson is not shown as a stockholder there, but does she hold some stock in the corporation?

A. She holds the inherited forty-two shares.

Q. And has she continued to hold them up to the present time?

A. That is right.

Q. There are six shares of stock, I believe you said, that are outstanding, that is, not reflected in the holdings of either Charles Chilberg, Clifford Nelson, or Greta Carlson?

A. Yes.

Q. How were those six shares held?

A. Six shares were purchased by the corporation and held as treasury stock by The L. Nelson and Sons.

Q. Is it still held at the present time as treasury stock?

A. That is right.

Exam. Baumgartner: May I interrupt a moment here? Did I understand that there were 500 shares of stock outstanding at one time?

The Witness: That's right, sir.

Exam. Baumgartner: And the outstanding stock today is 532 plus—just 532 plus forty-two shares?

The Witness: I'm sorry, no. It's still 500 shares. Six shares treasury stock, 226 shares to Charles Chilberg, 226 shares to Clifford Nelson, and forty-two shares to Greta [fol. 43] Nelson Carlson.

Exam. Baumgartner: Thank you.

By Miss Kelley:

Q. I don't recollect, Mr. Solomon, if I asked you what the consideration is that was paid for the original fifty shares sold by Kenneth Nelson and Oscar Herbert Chilberg?

A. Yes. It was the appraisal price, which was \$82.50 per

share. In other words, Kenneth Nelson and Oscar Chilberg sold their forty-two shares for \$3,465, respectively.

Q. Was your answer directed to the forty-two shares which they inherited from the estate, or to the original fifty shares which they held?

A. Merely to the forty-two shares held by the estate.

Q. And when you said they paid the appraised price, what did you mean by that?

A. The appraisal as listed in the federal estate inventory of Mrs. Linnea Nelson.

Q. Would it be the inventory of the estate as filed with the probate court and other instruments connected with the estate?

Mr. Joseloff: The original fifty shares was a gift, was it not, the one and the forty-nine? There was no price paid for that?

Miss Kelley: When they originally received the—

Mr. Keenan: Well, I—

Miss Kelley: Wait a minute—

Mr. Keenan: I object to counsel putting facts in the [fol. 44] record, even though my colleague asked for them. I think they should go in through a witness. I don't stipulate to them.

Miss Kelley: I believe the record is clear on the point and counsel was merely asking for clarification.

Mr. Keenan: I object to counsel for applicant—

Exam. Baumgartner: I don't recall whether the record shows the shares were a gift or consideration was paid for them.

Miss Kelley: We will clarify the point.

Exam. Baumgartner: All right. That is the fifty shares now.

By Miss Kelley:

Q. Mr. Solomon, going back to, I believe you testified, in 1949, when the four individuals: Kenneth Nelson, Clifford Nelson, Oscar Herbert Chilberg, and Charles Chilberg received the forty-nine additional shares of stock, do you know whether or not they paid consideration for those shares, or was it a gift from their mother?

A. It was a gift from their mother.

Q. Do you know what consideration Kenneth Nelson received for his fifty shares when he sold them on September 22, 1951?

A. Yes: \$5,000.

Q. And what was that based on?

A. Par value of the stock, a hundred dollars each.

Q. And do you know what the consideration was that Oscar Herbert Chilberg received?

A. Five thousand dollars.

Q. And that is when he sold them on June 30, 1951?

[fol. 45] A. That's right.

Q. Now, Mr. Solomon, do you have any financial interest at the present time, or, have you ever had any financial interest in The L. Nelson and Sons Company, or any interest other than as their public accountant?

A. None whatsoever, as far as financial interest goes.

Q. Well, no financial interest?

A. That's right.

Q. Do you have any interest in The L. Nelson and Sons Company other than as their public accountant?

A. Only as public accountant.

Q. To your knowledge, since the sale of the stock in 1951 and the transfer and completion of the transaction involving the stock inherited from their mother, have Kenneth Nelson or Oscar Herbert Chilberg had any interest, a financial interest, in the L. Nelson and Sons Company; and in answering that, would you include the other members of the family who sold their stock, too?

A. On the—

Mr. Keenan: Could I hear the question, if the Examiner please.

Miss Kelley: May I revise the question:

Q. To your knowledge, have Oscar Herbert Chilberg or Kenneth Nelson or the other members of the family who sold the stock inherited from their mother had any financial [fol. 46] interest in the L. Nelson and Sons Company?

A. None.

Miss Kelley: Is that question clear on the record? I was wondering if you think that question is clear on the record?

Exam. Baumgartner: I think so.

Q. How frequently do you confer with representatives of The L. Nelson and Sons Company, or are you at their place of business?

A. An average of three to five days per month.

Q. Who do you consult with in an official capacity?

A. Charles Chilberg.

Q. Will you tell us generally what you do for the company?

A. I supervise the books and records, supervise or prepare all tax returns, income and excise and federal taxes; and give recommendations on financial matters to Charles Chilberg.

Q. As their accountant do you attend stockholders and directors meetings?

A. On occasion, I do.

Q. Are the annual reports and other reports filed with the Interstate Commerce Commission by L. Nelson made up under your direction or by you?

A. They are prepared by me, yes.

Exam. Baumgartner: You are referring to the annual reports filed with the ICC?

Miss Kelley: Yes.

[fol. 47] The Witness: ICC annual reports.

Exam. Baumgartner: The quarterly, too?

The Witness: Yes, sir.

By Miss Kelley:

Q. Were the financial statements attached to the application filed in behalf of The L. Nelson and Sons Transportation Company, being Exhibits A-5, A-7(1), -(2), and -(3) prepared by you? They are at the first of the book, Mr. Solomon.

A. I prepared those statements as you enumerated.

Exam. Baumgartner: For the purpose of the record: Exhibit A-5 to the application is entitled "Balance Sheet,

May 31, 1955." Exhibit A-7(1) is entitled "Operating Statement, January 1, 1955, and May 31, 1955." Exhibit A-7(a) is entitled "Operating Statement, January 1, 1954, to December 31, 1954." Exhibit A-7 (3) is entitled "Income Statement, January 1, 1953, to December 31, 1953." All of which pertain to The L. Nelson and Sons Transportation Company.

[fol. 50] Q. Mr. Solomon, when did you first learn of the Gilbertville Trucking Company?

A. In January of 1953.

Q. And what was the occasion of your hearing of that company: Gilbertville Trucking Company?

A. I was requested to determine the feasibility, by Kenneth Nelson, to purchase, just how to arrange for the purchase of Gilbertville Trucking Company, Incorporated.

Q. And what proposals were under consideration with respect to this purchase?

A. Whether to purchase the assets or the capital stock.

Q. And did you advise Kenneth Nelson in connection with that matter?

A. Was I—will you repeat that question?

Q. Did you advise him in connection with the matter as—

A. I did.

Q. And what advice did you give him with respect to the purchase of the company, whether to purchase the stock or the assets?

A. To purchase the stock of Gilbertville Trucking Company.

Q. And why did you make a recommendation they purchase the stock?

[fol. 51] A. The corporation had a net operating loss that would be of value, should the corporation make any profits in the future, towards their income taxes.

Exam. Baumgartner: Federal income taxes?

The Witness: Federal income taxes.

Q. Now, whom did you consult with reference to the acquisition of the stock of the Gilbertville Trucking Company?

A. With Kenneth Nelson.

Q. Were you involved in any consultations with attorneys?

A. Yes.

Q. In connection with the purchase of the Gilbertville Trucking Company?

A. Yes.

Q. And can you tell us—not necessarily the names—but who did the attorneys represent?

A. Yes. Arthur Paroshinsky—p-a-r-o-s-h-i-n-s-k-y—of Springfield, Massachusetts, represented Kenneth Nelson; Attorney Arthur Zandan—z-a-n-d-a-n—of Springfield, Massachusetts, represented the stockholder, Mr. Vachon—v-a-c-h-o-n—and—

Q. He was a stockholder of what company?

A. Of Gilbertville Trucking Company.

Q. Were other persons consulted or involved in that purchase? Any other person?

Exam. Baumgartner: Just a minute. Had you completed your answer concerning the attorneys?

The Witness: Yes, sir.

Exam. Baumgartner: Excuse me. I thought he had some more to add to it.

Miss Kelley: I began to wonder myself.

By Miss Kelley:

Q. Were other persons consulted or involved in that purchase?

A. The then accountant for Gilbertville Trucking Company, Francis J. Mahoney—m-a-h-o-n-e-y.

Q. Do you have knowledge as to when Kenneth Nelson purchased the stock of the Gilbertville Trucking Company?

A. Yes. He purchased the stock effective March 1, 1953.

Q. How many shares of stock were held by the Gilbertville Trucking Company at that time?

A. A hundred shares, common capital stock, par value one dollar per share.

Exam. Baumgartner: Pardon me. This is Gilbertville stock you are speaking of?

Miss Kelley: Yes.

Mr. Williams: Pardon me, was that one dollar per share or one thousand?

The Witness: One dollar per share, a hundred shares of capital stock.

By Miss Kelley:

Q. Mr. Solomon, do you have personal knowledge as to the terms and conditions under which the stock of Gilbert-[fol. 53]ville Trucking Company was purchased by Kenneth Nelson and the consideration paid for it?

A. Yes, I do.

Q. Would you tell us that?

Mr. Keenan: If the Examiner please, could we hear what the source of the witness' personal knowledge is, unless, of course, he is testifying about events which he personally observed.

Exam. Baumgartner: Will you do that, Miss Kelley.

Q. Will you tell us the source of your information, Mr. Solomon?

A. The source?

Q. Yes. How did you acquire your knowledge with respect to—

A. I was—

Q. —to those matters?

A. I was going to read it from the purchase agreement. I was assigned by Kenneth Nelson.

Q. To do what?

A. In the transaction the purchase price was \$35,000 plus the corporation's cash, accounts receivable and pre-paid items less any liabilities as of February 28, 1956.

Mr. Keenan: Mr. Examiner, I don't believe the witness is answering Miss Kelley's question.

Exam. Baumgartner: I don't think that answer is quite responsive.

By Miss Kelley:

Q. Mr. Solomon, will you first tell us what your part was in connection with Kenneth Nelson purchasing the stock

[fol. 54] of Gilbertville Trucking Company, and I believe you have said that you were consulted as to whether he would buy the assets or he would buy the stock; and will you explain how you participated in the transaction?

A. Yes.

Q. Were you involved in the drawing up of the agreement, and so forth and so on, so that you can be qualified to answer further questions.

A. I did not have anything to do with the drawing up of the agreement. I did participate in order to determine the liabilities and the assets of the corporation.

Q. Were you present during conferences between the two attorneys that you previously testified about and Mr. Mahoney the accountant, who was the accountant for Gilbertville at that time?

A. I did visit the accountant, Mr. Mahoney, at his office in order to determine the assets and liabilities of the corporation.

Q. Did you have knowledge of the terms of the agreement simultaneously with it being executed?

A. I did.

Q. Were you involved in all facts and details in connection with that purchase?

Mr. Keenan: Mr. Examiner, I am not sure that question is entirely clear—

Miss Kelley: Let me withdraw—

Mr. Keenan: Excuse me. I don't think counsel should [fol. 55] lead in that manner in such an issue.

Exam. Baumgartner: Well, it's more or less of a preliminary question.

Mr. Keenan: I agree, sir. I do repeat my request: We still haven't learned what the source of the witness' information is.

Exam. Baumgartner: I think he is trying to explain. May I interject a question or two at this point?

Miss Kelley: I would be happy if you would.

Exam. Baumgartner: Mr. Solomon, did you participate in conferences in which these transactions were discussed?

The Witness: I did.

Exam. Baumgartner: And did you at those conferences

FACTS AND CIRCUMSTANCES WHICH
APPLICANTS RELY UPON TO WARRANT
APPROVAL OF THE PROPOSED TRANSACTION

Attach to original and each copy of this application the following exhibits, identifying each as indicated:

D—1. To explain and support the reasonableness of the consideration involved in the proposed transaction.

D—2. To show the effect of the proposed transaction upon adequate transportation service to the public.

D—3. To establish that the increase, if any, of total fixed charges resulting from the proposed transaction would not be contrary to the public interest.

D—4. To establish that any guaranty or assumption of payment of dividends or fixed charges contemplated in the transaction is not inconsistent with the public interest.

D—5. To show the effect of the transaction on the interests of the carrier employees affected.

D—6. To establish that the transaction will be consistent with the public interest.

If transferee is a carrier by railroad subject to part I of the Interstate Commerce Act, or a person which is controlled by such a carrier, or affiliated therewith—

D—7. To show that the proposed transaction will enable such carrier by railroad to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

If the proposed transaction would result in dual operations, or the extension of such operations by transferee, or by transferee and any person controlling, controlled by, or under common control with transferee—

D—8. To show that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy.

[fol. 382]

CERTIFICATE OF SERVICE

I, Mary E. Kelley DO HEREBY CERTIFY that upon the 5th day of October, 1955, a copy of the application of The L. Nelson & Sons Transportation Company for authority under section 5 of the Interstate Commerce Act to Merge the operating rights and property of Gilbertville Trucking Co., Inc. was delivered, in person or by registered or receipted mail, to each of the following Boards, Commissions, or officials having authority to regulate the business of transportation by motor vehicle (or the Governor where there is no Board, Commission, or official) of the States in which the applicants or the carriers involved in the application operate:

I further certify that I have made diligent inquiries to determine the names of all competitors, and that a notice of the filing of this application, Form BMC-15A, was delivered, in person or by registered or receipted mail, to the following carriers by motor vehicle, rail, or water, known to the applicants, with whose service the operations described in this application, including the proposed unified operations, are or will be directly competitive: (Applicants should make diligent inquiries, including among other places, the appropriate field offices of the Commission's Bureau of Motor Carriers, to determine the name of every motor carrier, railroad, or water carrier with whose service the operations described in this application are or will be competitive.)

Name of State Board

Address

New Hampshire Public Service Commission,

Mass. Department of Public Utilities,

Concord, N. H.
100 Nashua St.,
Boston, Mass.

R. I. Department of Business

Regulations,
 Conn. Public Utilities Commission,
 New York Public Service Commission,
 N. J. Board of Public Utilities

Commissioners,
 Pa. Public Utilities Commission,
 Del. Public Service Commission
 Va. State Corporation Commission,
 Md. Public Service Commission,
 D. C. Public Utilities Commission,
 Vt. Public Service Commission,

Providence, R. I.
 Hartford, Conn.
 Albany, N. Y.

Trenton, N. J.
 Harrisburg, Pa.
 Dover, Delaware
 Richmond, Va.
 Baltimore, Md.
 Washington, D. C.
 Montpelier, Vt.

(Use additional sheet or sheets if necessary)

Signed.....

(S) Mary E. Kelley

[fol. 383]

**FACTS AND CIRCUMSTANCES WHICH APPLICANT
 RELIES UPON TO WARRANT APPROVAL OF
 THE PROPOSED TRANSACTION.**

- D—1 This transaction involves the merger of all the properties of the two motor carriers involved, the stock of transferor to be exchanged for shares of transferee having equal value, based on the net value of the stock of each respective company at the time of consummation. It is the belief of the parties that the consideration here involved is fair and equitable.
- D—2 The merger of all the properties of Nelson and Gilbertville will permit the rendition of a more flexible service and greater utilization of equipment, all of which will result in an improved and more economical service being made available to the public utilizing the transportation services of transferee and transferor.
- D—3 This transaction will not result in any increase in the fixed charges of Nelson, the surviving carrier.
- D—4 There is no guaranty or assumption of payment of dividends or fixed charges contemplated in this transaction.

D—5 It is not anticipated that this transaction will affect the employees of either transferee or transferor.

D—6 Nelson, under authority granted in Certificate No. MC 42871, is authorized to transport textile products. There has been a trend in the textile business to relocate plants in the south, which trend has resulted in unbalanced loading for Nelson. Gilbertville and Nelson operate in substantially the same areas; trucks of both companies are dispatched daily to the same general areas. The merger of the properties will result in the elimination of wasteful transportation, will permit greater utilization of equipment and manpower, and result in many economies, all of which will result in a more efficient and economical operation.

[fol. 384]

BEFORE THE INTERSTATE COMMERCE COMMISSION

ORDER—December 20, 1955

At a Session of the INTERSTATE COMMERCE COMMISSION, division 4, held at its office in Washington, D. C., on the 20th day of December, A. D. 1955.

No. MC-F-6178

THE L. NELSON AND SONS TRANSPORTATION COMPANY—INVESTIGATION OF CONTROL— GILBERTVILLE TRUCKING CO., INC.

It appearing, That The L. Nelson and Sons Transportation Company, of Ellington, Connecticut, and Gilbertville Trucking Co., Inc., of Gilbertville, Massachusetts, are motor carriers subject to the Interstate Commerce Act, and

It appearing, That control or management of Gilbertville Trucking Co., Inc., in a common interest with The L. Nelson and Sons Transportation Company, may have been effectuated and may be continuing in violation of Section 5(4) of the said Act, and that the persons hereinafter named as respondents may have effectuated or participated in effectuating such common control or management.

It is ordered, That an investigation on the Commission's own motion be, and it is hereby, instituted for the purpose of inquiring into and concerning said possible violations, and all matters connected therewith or related thereto, as provided in Section 5(7) of the said Act, and, if such violations are found, to enter an order requiring any person participating therein to take such action as may be necessary to prevent further violations of said provisions;

It is further ordered, That The L. Nelson and Sons Transportation Company, Ellington, Connecticut, Gilbertville Trucking Co., Inc., Gilbertville, Massachusetts, Charles G. Chilberg, Rockville, Connecticut, Clifford J. O. Nelson, Dover, Massachusetts, Greta C. Carlson, Rockville, Connecticut, and Kenneth A. H. Nelson, Ellington, Connecticut, be, and they are hereby, made respondents in this proceeding;

It is further ordered, That this matter be assigned for hearing concurrently with hearing in The L. Nelson and Sons Transportation Company—Control and Merger—Gilbertville Trucking Co., Inc., Docket No. MC-F-6099, at a time and place to be fixed, and that the two proceedings be heard and determined on a joint record;

It is further ordered, That the Bureau of Inquiry and Compliance shall give timely notice to the respondents prior to the hearing to be held herein with respect to the particular matters indicating possible unlawful control or management as to which the Bureau will submit evidence at the hearing; and

It is further ordered, That a copy of this order be served upon each of said respondents, and that notice of this proceeding be given to the public by posting a copy of this order in the office of the Secretary of the Commission at Washington, D. C.

By the Commission, Division 4.

(SEAL)

HAROLD D. MCCOY,
Secretary.

[fol. 1]

BEFORE THE INTERSTATE COMMERCE COMMISSION
Docket No. MC-F-6099

In the matter of

THE L. NELSON & SONS TRANSPORTATION CO.—CONTROL
AND MERGER—GILBERTVILLE TRUCKING CO., INC.

Docket No. MC-F-6178

In the matter of

THE L. NELSON & SONS TRANSPORTATION COMPANY—INVESTIGATION OF CONTROL—GILBERTVILLE TRUCKING CO., INC.

Transcript of Hearing

Courtroom No. 4
Federal Building
Boston, Massachusetts
Monday, September 17, 1956

Met, pursuant to notice, 9:30 a.m.

Before: WALTER L. BAUMGARTNER, Examiner.

APPEARANCES:

Mary E. Kelley, 84 State Street, Boston 9, Massachusetts, appearing for applicant.

Herman F. Mueller, 824 New Post Office Building, Boston, Massachusetts, Bureau of Inquiry and Compliance, Interstate Commerce Commission.

James G. Lane, 226 South Station, Boston, Massachusetts, Eastern Railroads as intervenor in opposition in MC-F-6099, intervenor in support of ICC position in MC-F-6178.
[fol. 2]

Kenneth B. Williams, 89 State Street, Boston 9, Massachusetts, Alvin R. Holmes, d/b/a Holmes Transportation Service and/or Jones Express, Taylor's Express Co., New-

burgh Transfer, Inc., and P. B. Mutrie Motor Transportation, Inc., intervenors in opposition in MC-F-6099 and intervenors in support of the Interstate Commerce Commission in MC-F-6178.

Francis E. Barrett, Jr., 7 Water Street, Boston 9, Massachusetts, Adley Express Company, M & M Transportation Co., and Hemingway Brothers Interstate Trucking Co., Inc., protestants.

Hugh M. Joseloff, 410 Asylum Street, Hartford 3, Connecticut, H. T. Smith Express Co., Downing & Perkins, Lombard Bros., Inc., National Transportation Co., protestants in MC-F-6099, intervenors in opposition in MC-F-6178.

William Q. Keenan, 54 Meadow Street, New Haven, Connecticut, Eastern Territory Railroads, intervenors in opposition in MC-F-6099, and intervenors in support of Bureau of Enforcement in MC-F-6178.

Arthur J. Piken, 160-16 Jamaica Avenue, Jamaica 32, New York, Westchester Motor Lines, Inc., and Jackson Transportation Corp., protestants.

[fol. 27] SANOL J. SOLOMON was sworn and testified as follows:

Direct examination.

By Miss Kelley:

Q. May we have your name, business address, and occupation?

A. Sanol—s-a-n-o-l—J. Solomon—s-o-l-o-m-o-n—63 East [fol. 28] Center Street, Manchester, Connecticut, public accountant.

Q. And how long have you been a public accountant, Mr. Solomon?

A. Twenty-seven years.

Q. And are you employed as an accountant by The L. Nelson and Sons Transportation Company?

A. Yes.

Q. And how long have you been employed as their accountant?

A. January of 1949.

Q. Was the business of L. Nelson and Sons incorporated at the time of your employment?

A. Yes, it was.

Q. In the course of your employment, and since the time that you were first employed by the company as a public accountant, are you aware of the names of the officers and directors and stockholders of The L. Nelson and Sons Company?

A. Yes.

Q. Would you tell us who were the officers, directors, and stockholders when you first became connected with the company?

A. Linnea Nelson, president and treasurer—

Mr. Keenan: Could we hear the first name spelled?

The Witness: Linnea—l-i-n-n-e-a—Nelson, president and treasurer; Oscar Herbert Chilberg, vice-president; Charles—

Mr. Keenan: Could we hear the last name spelled?

The Witness: Chilberg—c-h-i-l-b-e-r-g.

Mr. Keenan: What was Chilberg?

[fol. 29] The Witness: Oscar Herbert.

Mr. Keenan: I didn't hear the office, if the Examiner please.

The Witness: Again, vice-president, Charles Chilberg, assistant treasurer, Clifford Nelson—I'm sorry, it's Kenneth Nelson who is assistant treasurer.

Exam. Baumgartner: What is that first name?

The Witness: Kenneth Nelson—k-e-n-n-e-t-h—and the secretary is Clifford Nelson.

By Miss Kelley:

Q. How is—

Mr. Keenan: Mr. Examiner, for clarification, could I inquire whether the witness is now giving us the officers as of January, 1949?

Miss Kelley: Yes. That was the question.

The Witness: That's right.

By Miss Kelley:

Q. How was the stock held at that time: January, 1949?

A. There were 500 shares of outstanding common stock with Linnea Nelson holding 496 shares; Kenneth Nelson, one share, Clifford Nelson, one share; Charles Chilberg, one share; and Oscar Chilberg, one share.

Exam. Baumgartner: Who held the 496?

The Witness: Four-ninety-six, Linnea Nelson.

By Miss Kelley:

Q. At some time later was there some change in the number of shares held by Kenneth Nelson, Clifford Nelson, Charles Chilberg, and Oscar Chilberg?

[fol. 30] A. Yes. Linnea Nelson became deceased on January 5, 1950.

Q. Well, prior to her death on January 5, 1950, had the stockholdings of the company, the stockholders of the company, remained the same as they were in January of 1949? That is, 496 shares to her?

A. No. During 1950 Linnea Nelson gave forty-nine additional shares to each of the four who had shares before, meaning, Kenneth Nelson, from his one share, he secured an additional forty-nine to make fifty; Clifford Nelson, forty-nine additional shares; Charles Chilberg, forty-nine additional shares; and Oscar Chilberg, forty-nine additional shares. Linnea remained holding 300 shares.

Exam. Baumgartner: When did that occur?

The Witness: In 1950.

Q. Well, did I understand you to say that Mrs. Nelson died on January 5, 1950?

A. I'm sorry. It was in 1949 that Mrs. Linnea Nelson gave the shares, that's right.

Exam. Baumgartner: It was during 1949?

The Witness: During 1949.

Q. For clarification in the record, what relation were Oscar Chilberg and Charles Chilberg to Mrs. Nelson?

A. They are sons of a first marriage.

Q. So that—

Mr. Keenan: Excuse me. For clarification, when counsel [fol. 31] set refers to Mrs. Nelson, is counsel referring to Linnea Nelson?

Miss Kelley: That is the only Mrs. Nelson who is in the picture at this time.

By Miss Kelley:

Q. And Oscar Chilberg and Charles Chilberg are half brothers of Kenneth Nelson and Clifford Nelson?

A. That is right.

Q. Are you familiar, because of your employment as accountant, with the terms of Mrs. Nelson's will?

A. I am.

Q. And under her will how was her property, and specifically the stock of The L. Nelson and Sons Company, distributed?

A. Yes. At the time of Mrs. Nelson's decease on January 5, 1950, she held 300 shares and each of her seven children were left forty-two shares, making a total of 294 shares. The remaining six shares were held as treasury stock by the corporation.

Mr. Keenan: Remaining six?

The Witness: Remaining six shares were purchased by the corporation.

By Miss Kelley:

Q. Now, after her death and while the estate was being administered, who held that stock?

A. Yes.

Q. The 300 shares?

A. Yes. Forty-two shares were held by Oscar Chilberg, forty-two shares by Charles Chilberg, forty-two shares by [fol. 32] Howard Chilberg, forty-two shares by Ruth Widham.

Exam. Baumgartner: Ruth—

The Witness: Ruth Nelson Widham.

Mr. Keenan: I'm sorry. I didn't hear that last word: widow?

The Witness: Widham—w-i-d-h-a-m.

By Miss Kelley:

Q. Was the stock of the corporation immediately distributed to the heirs upon the death of Mrs. Nelson?

A. Not until the close of the estate: December 31, 1952. Then there was a process before it was distributed to each of the seven children, which took place January 24.

Q. I believe you misunderstood my previous question. During the period between her death and the closing of the estate, how was that stock held and voted?

A. Yes. The stock was held by the estate and it was voted—there were three executors: Charles Chilberg, Oscar Chilberg, and Ruth Nelson Widham, with Charles Chilberg doing the voting for the stock that was held by the estate.

Q. By proxy?

A. By proxy of the others, the other two executors.

Q. Now, at some time was there a change in the stock-holdings?

A. Yes. On June 30, 1951, the original fifty shares held by Oscar Chilberg was sold.

Q. Who was that sold to?

A. Charles Chilberg.

Q. Thereafter was—

[fol. 33] A. Oh, I'm sorry. Your question goes on further, does it?

Q. Well—

A. You want to know all the persons who sold stock?

Q. Yes. Would you give us all at this time?

A. I'm sorry. Kenneth Nelson on September 22, 1951, sold his original fifty shares to Clifford Nelson.

Q. So at that time were the estate and Clifford Nelson and Charles Chilberg the stockholders of L. Nelson and Sons?

A. The estate, Charles Chilberg, and Clifford Nelson is correct.

Mr. Keenan: Excuse me, if the Examiner please. Counsel said "at that time." I don't know what time is being referred to.

The Witness: The time would be in 1951.

Mr. Keenan: Could I hear the question and his answer, if the Examiner please?

Exam. Baumgartner: Miss Reporter, will you read the question and answer.

[Question and answer read by the reporter as follows:

"Q. So at that time were the estate and Clifford Nelson and Charles Chilberg the stockholders of L. Nelson and Sons? A. The estate, Charles Chilberg, and Clifford Nelson is correct."] The record was also read through Line 13.]

Mr. Keenan: Well, for clarification, Mr. Examiner, could I inquire what time during 1951 is referred to?

Miss Kelley: If you will be patient I will try and develop [fol. 33a] it.

Mr. Keenan: Withdraw the request.

By Miss Kelley:

Q. I believe you testified that the original fifty shares of Oscar Chilberg was sold on July 30, 1951, and the original fifty shares of Kenneth Nelson was sold on September 22, 1951. Was that the period that you were testifying to in answer to my previous question as to the estate and the two remaining stockholders?

A. That's right.

Mr. Williams: Pardon me, Mr. Examiner. I think you said July once and June once. I don't know which is which.

Miss Kelley: July 30 is what I meant.

Mr. Williams: He stated—

By Miss Kelley:

Q. Are the correct dates for the sale of the original fifty shares: July 30, 1951, and September 22, 1951?

A. That is correct.

Exam. Baumgartner: July 30, 1951, instead of June 30, 1951?

The Witness: It's June 30 of 1951. Didn't you say June 30?

not be modified or amended except by a further agreement in writing signed by all of the parties.

8. This agreement shall be binding upon and shall inure to the benefit of the parties hereto, their heirs, successors or assigns.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed in triplicate as of the day and year first above written.

.....
KENNETH NELSON

GILBERTVILLE TRUCKING CO., INC.

By
Kenneth Nelson, Pres. & Treas.

THE L. NELSON & SONS TRANSPORTATION COMPANY

By
Charles G. Chalberg, Pres. & Treas.

[fol. 376]

APPENDIX TO EXHIBIT "C-1"

Basis of Determining Valuation and Issuance of Nelson Stock in Exchange for Gilbertville Stock

<u>Capital Stock Distribution:</u>	<u>Original Net Worth Shares as of Issued May 31, 1955</u>	<u>% of Conso- lidated Net Worth</u>	<u>Prior to Con- solidation val- uation per share.</u>	<u>Value per share after issuing 85 shares of Nelson Stock for 100 sh. of Gilbertville.</u>	<u>Valuation of all out- standing shares after merger.</u>	
The L. Nelson & Sons	500	\$151,737.15	85.55%	\$303.47	500 shares - \$303.188	\$151,594.11
Gilbertville	100	\$ 25,627.94	14.45%	\$256.23	85 shares - \$303.188	\$ 25,770.98
		<u>\$177,365.09</u>	<u>100%</u>			<u>\$177,365.09</u>

GILBERTVILLE TRUCKING COMPANY, INCORPORATED
STATEMENT OF LEDGER VALUE FOR ALL PROPERTY
AS OF MAY 31, 1955.

Revenue Equipment, Trucks, Tractors, Trailers (Schedule Below)	\$68,937.31		
Res. for Depreciation	<u>21,301.73</u>	\$47,635.58	
Furniture & Office Equipment	1,969.31		
Res. for Depreciation	<u>76.09</u>	1,893.22	
Service Cars	1,222.21		
Res. for Depreciation	<u>432.82</u>	789.39	
TOTAL ALL PROPERTY			\$50,318.19

Segregation of Revenue Equipment:

<u>Trucks:</u> International-straight (4)	5,117.00		
Reserve for Depr.	<u>519.40</u>		4,597.60

<u>Tractors:</u> Mack -1945 (1)	7,000.00		
Reserve for Depr.	<u>7,000.00</u>	None	
International-Used - 1948 & 1949 (4)	800.00		
Reserve for Depr.	<u>116.76</u>	683.24 ^b	
International-New-1955 (3)	19130.77		
	<u>1100.72</u>	18030.05	18,713.29

<u>Trailers:</u> Strick-New-1953 (7)	33250.00		
Reserve for Depr.	<u>11544.65</u>	21705.35	
Fruehauf-new-1953 (1)	3639.54		
Reserve for Depr.	<u>1020.20</u>	2619.34	24,324.69

TOTAL LEDGER VALUE OF REVENUE EQUIPMENT			<u>47,635.58</u>
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Miscellaneous Equipment

Service Car-Chevrolet-1953	1222.21		
Reserve for Depr.	<u>432.82</u>	789.39	

GILBERTVILLE TRUCKING COMPANY, INCORPORATED.
ENCUMBERED PROPERTY AS OF
MAY 31, 1955

<u>Encumbered Property</u>	<u>Financed By</u>	<u>Rate per month for Finance</u>	<u>24 months Charge</u>	<u>Date Issued</u>	<u>Maturity Date</u>
Int. Tractor #17	*Int. Harv. Cr. Corp.	\$234.90	\$337.60	2/1/55	1/1/57
Int. Tractor #18	* " " " " "	221.60	318.40	2/1/55	2/1/57
Int. Tractor #19	* " " " " "	197.88	436.40	4/3/55	10/15/57
Strick Trailers #110, 111, 112	*Phila., Pa., 1st Nat'l. Bank	447.80	560.28	7/24/53	6/24/55
Strick Trailers #114, 115, 116, 117	* " " " "	723.32	896.50	10/3/53	9/3/55
Int. Straight Trucks #3, 4	*Int. Harv. Cr. Corp.	221.60	318.40	2/15/55	1/15/57

* * * * *

<u>Encumbered Property</u>	<u>Original Face Value</u>	<u>Balance due May 31, 1955</u>
Int. Tractor #17	\$5,637.60	\$4,463.10
Int. Tractor #18	5,318.40	4,432.00
Int. Tractor #19	5,936.40	5,738.52
Strick Trailer #110, 111, 112	10,747.20	447.80
Strick Trailer #114, 115, 116, 117	17,359.68	2,169.96
Int. Straight Trucks # 3, 4	5,318.40	4,432.00
		<u>\$21,683.38</u>

*All Encumbered Evidenced By Conditional Sales Contract.

Int. -- means International.

[fol. 378]

EXHIBIT C-3 TO EXHIBIT "C"

THE L. NELSON AND SONS TRANSPORTATION COMPANY
(INCLUDING GILBERTVILLE TRUCKING COMPANY, INCORPORATED)
CONSOLIDATED "GIVING EFFECT" BALANCE SHEET AS OF MAY 31, 1955.

[fol. 379]

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EXHIBIT C-5970 EXHIBIT "C"

Current Assets:

Cash	3,319.46	
Accounts Receivable - Customers	189,115.68	
Accounts Receivable - Others	7,672.49	
Prepaid Insurance, interest, tires, tubes, rent	34,520.28	
Total Current Assets.	<u>234,627.91</u>	

Tangible Property:

Carrier, Operating Prop.	585,891.32	
Res. for Depr. & Amort.	<u>266,931.35</u>	318,959.97

Intangible Property:

Organization	741.37	
Res. for Amortization	<u>591.37</u>	150.00
Franchises	13,060.61	
Res. for Amortization	<u>6,810.61</u>	6,250.00

TOTAL ASSETS

\$559,987.88

Current Liabilities:

Accounts Payable	145,182.88	
Wages Payable	3,502.52	
Taxes Accrued	<u>29,923.97</u>	178,609.37

Advances Payable:

Notes Payable - Officers		3,728.43
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Equipment Obligations:

Notes Payable - Equipment		159,691.57
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Reserves:

Injuries, Loss & Damage Reserve	3,897.89	
State & Fed. Corp. Income Taxes	<u>17,295.13</u>	21,193.02

Capital Stock:

Common Capital Stock (585 Shares)	* 58,500.00	
Less: Reacquired Securities	<u>600.00</u>	57,900.00

Unappropriated Surplus:

Unearned Surplus	**25,403.61	
Earned Surplus	<u>62,484.38</u>	87,887.99
Net Profit for 5 months after deducting Corporation Income Taxes:		

Reserves:

Injuries, Loss & Damage Reserve
State & Fed. Corp. Income Taxes

3,897.89
17,295.13 21,193.02

Capital Stock:

Common Capital Stock (585 Shares)
Less: Reacquired Securities

* 58,500.00
600.00 57,900.00

Unappropriated Surplus:

Unearned Surplus
Earned Surplus
Net Profit for 5 months after deducting
Corporation Income Taxes:

**25,403.61
62,484.38 87,887.99

The L. Nelson and Sons
Gilbertville Trucking Co., Inc.

21,785.54
9,191.56 30,977.10

TOTAL LIABILITIES & CAPITAL

\$559,987.88

Consolidated "Giving Effect" Balance sheet based on Nelson Exhibit A-5
and Gilbertville Exhibit B-4 respectively.

*Capital Stock Distribution:

The L. Nelson-Net Worth-May 31, 1955
Gilbertville-Net Worth-May 31, 1955
Consolidated Net Worth-May 31, 1955

151,737.15 - 85.55%
25,627.94 - 14.45%
177,365.09 - 100%

The L. Nelson-Capital Stock Outstanding
Gilbertville - Orig. Capital Stock

50,000.00 85.47%

Exhibit B-4 100.00

Plus From Unearned Surplus 8,400.00

8,500.00 14.53%

Adjusted Capital Stock Outstanding

*\$58,500.00 100

*Unearned Surplus (or Paid In Surplus)

The L. Nelson Exhibit A-5
Gilbertville - Exhibit B-4 32,966.23

837.38

Less Adjustment to

Capital Stock 8,400.00

24,566.23

Consolidated Unearned Surplus

**25,403.61

THE L. NELSON AND SONS TRANSPORTATION COMPANY AND
GILBERTVILLE TRUCKING COMPANY CONSOLIDATED "GIVING
EFFECT" OPERATING STATEMENT FROM JANUARY 1, 1955 to
MAY 31, 1955.

	Actual <u>Consolidated Operations</u>	"Giving Effect" <u>Merger Operations</u>
Revenue:		
Operating Freight Rev.	\$642,474.00	642,474.00
Operation & Mainten. Exp.:		
Equip. & Mainten.	\$74,665.55	68,931.49
Transportation	230,855.02	221,075.44
Terminal	126,154.04	121,293.06
Traffic	5,435.76	5,435.76
Insurance & Safety	31,906.93	30,021.96
Admin. & General	46,459.44	41,508.82
Total Operation & Mainten. Exp.	515,476.74	488,266.53
Other Expenses:		
Depreciation Expense	36,874.10	36,874.10
Depr. Adjustment (Gain)	(2,328.96)	(2,328.96)
Amort. Chargeable to Operations	625.00	625.00
Operating Taxes & Licenses	38,726.84	70,718.26
	<u>73,896.98</u>	<u>35,548.12</u>
	589,373.72	558,984.79
Net Operating Revenue	58,100.28	83,489.21
Other Deductions:	<u>5,184.77</u>	<u>5,184.77</u>
Net Income Before Income Taxes	47,915.51	78,304.44
Income Taxes	<u>20,247.00</u>	<u>36,345.89</u>
NET INCOME	<u>\$27,668.51</u>	<u>\$41,958.55</u>

"EXHIBIT C-8 OMITTED"

(Esso Standard Oil Co. map of Northeast
United States with routes indicated of
The L. Nelson & Sons Transportation Co.
and Gilbertville Trucking Co., Inc.)

[Vol. 380]

EXC

Exam. Baumbartner: What date was that, Mr. Solomon?

The Witness: July 24, 1953.

Q. After the stock transfer were the new officers and directors of Gilbertville elected?

A. Right at that time the new officers were elected.

Q. Did something with respect to this transfer that we are now discussing occur on March 1, 1953, Mr. Solomon?

A. Yes, sir.

[fol. 161] Q. What was that?

A. That is the date Kenneth Nelson took over the operation of Gilbertville.

Q. Then he took the operation over before he purchased it, is that correct?

A. No. He deposited escrow funds at that time, on March 3, 1953, I believe.

Q. Well, now, on direct yesterday you said that subsequently there was a shifting of the stock ownership in Gilbertville. What is the source of your knowledge as to these stock shifts?

A. The stock shifts: from the stock transfer book only and the minute book of the corporation.

Exam. Baumgartner: Of which: Gilbertville, you are talking about?

The Witness: Yes.

By Mr. Mueller:

Q. I believe you said that as of January 19, 1954, fifty-one shares in Gilbertville went to Kenneth A. H. Nelson?

A. I believe I stated that the forty-eight shares held by Oscar Herbert Chilberg went to Kenneth Nelson.

Q. So that, as of January 19, 1954, how many shares did Kenneth A. H. Nelson hold?

A. First I would like to correct the date. Instead of January, which I did say yesterday—which would be the approximate date—the exact date is April 1, 1954.

[fol. 162] Mr. Keenan: Exact date for what?

The Witness: For the transfer of the stock from Oscar Herbert Chilberg to Kenneth Nelson.

Q. What—

A. Transfer of the stock.

Q. What date?

A. April 1, 1954. I found that in the minute book last night, of Gilbertville.

Miss Kelley: If you recall, Mr. Examiner, yesterday I volunteered a date. It was rechecked last night and it seems that my notes were in error, and this is merely the correction.

By Mr. Mueller:

Q. So that after April 1, 1954, how many shares did Kenneth Nelson hold?

A. He held fifty-one shares. Phyllis Nelson, his wife, had twenty-four shares. John—

Mr. Keenan: Would you hold up for just one minute now?

The Witness: Yes.

Mr. Keenan: So that I can—Kenneth Nelson—go ahead.

The Witness: Fifty-one shares; his wife, Phyllis Nelson, twenty-four shares; John Kashady—k-a-s-h-a-d-y—twenty-four shares; and one share to Arthur Paroshinsky—p-a-r-o-s-h-i-n-s-k-y.

By Mr. Mueller:

Q. Do you know what consideration was paid by John Kashady for the stock which stands in his name?

A. Nothing at all did he pay for it.

[fol. 163] Q. May we have that answer again?

A. John Kashady did not pay anything for his twenty-four shares of stock.

Q. It was a gift?

A. Yes, to lend prestige to his job as supervisor.

Exam. Baumgartner: What was the purpose?

The Witness: To lend prestige to his job as supervisor of the terminal.

By Mr. Mueller:

Q. Have you ever seen the stock certificate in the name of Kashady?

A. I don't think I have.

Q. You don't know whether he ever had possession of the stock certificate?

A. That is right: I wouldn't know.

[fol. 165] By Mr. Mueller:

Q. Well, please tell us what equipment, repair facilities the Gilbertville Trucking Company has?

Miss Kelley: Mr. Examiner, I object to that on the ground that I don't believe the complete information would be within the knowledge of Mr. Solomon.

Exam. Baumgartner: Well, if he doesn't know he can say so. That is up to him.

[fol. 166] The Witness: Well, I do know equipment is repaired at various places.

By Mr. Mueller:

Q. By whom?

A. By various independent contractors.

Q. Have they any mechanics, has Gilbertville any mechanics, on its payroll?

A. Yes. In New York City they have a mechanic on the payroll.

Q. We are talking about Gilbertville now.

A. Yes.

Q. Isn't it a fact, Mr. Solomon, that the repairs to the equipment of the Gilbertville Trucking Company are effectuated at the shops of The L. Nelson and Sons Transportation Company?

A. Not all the—

Q. Are some of them?

A. Some of them, yes, sir.

Q. Can you say what proportion of the expense of repair and maintenance—

A. I could not. I have never made any analysis that way, sir.

Q. Would there be any records available to show repairs to Gilbertville equipment at Nelson and Sons' garages or—

A. Sorry. There would be records available to show what has been done there, yes. Bills are made out by Nelson to—

Q. Can you tell us the general basis on which such charges are assessed against Gilbertville?

A. The labor on a bill would be inserted, that is, the time [fol. 167] of the labor, and what work was done, parts used.

Q. Would there be any element of profit to The Nelson and Sons Transportation Company in such a statement, or is this done on a cost basis?

A. I wouldn't know whether it was a profit or whether it was at cost.

Miss Kelley: Mr. Examiner, may I inquire if Mr. Solomon has any records in the hearing room with him which might refresh his recollection on that point?

The Witness: These are records, yes, available to look up.

Exam. Baumgartner: But you couldn't answer the question without consulting those records?

The Witness: Yes, sir, I could not answer that.

Exam. Baumgartner: Could not answer it?

The Witness: Could not answer it.

By Mr. Mueller:

Q. Are you acquainted with the equipment lists?

A. Yes.

Q. Or, equipment records of the Gilbertville Company?

A. Yes, sir.

Q. And also of The Nelson Company?

A. Yes, sir. May I—

[fol. 169] By Mr. Mueller:

Q. I wanted to know whether Gilbertville has in its files a complete list of the motor vehicle equipment of The L. Nelson Transportation Company?

A. I wouldn't know that.

Q. You couldn't know?

A. No, I wouldn't know.

Q. Do you know if equipment of Nelson is freely leased by Gilbertville—

Miss Kelley: I object to the characterization of the question, because the interpretation that can be placed on "freely" by one person, would be completely different than that of another. If the question is restated as to the frequency or the number of times, or something of that type, I would have no objection to it.

Exam. Baumgartner: Will you strike the word "freely"?

Mr. Mueller: I will gladly strike the word "freely."

The Witness: The equipment of Nelson is leased to Gilbertville Trucking.

By Mr. Mueller:

Q. Do you have any figures available to show the frequency with which that is done?

A. I couldn't give you the frequency. I could give you the dollar figures.

Q. Is that listed in the uniform system of accounts under [fol. 170] purchased transportation?

A. That's right, sir.

Q. Can you say as of the present time how much that amounts to?

Miss Kelley: May I ask—

Q. For a given period?

Exam. Baumgartner: Well, can you state the period in your question, Mr. Mueller?

Q. Let us take so far this year.

Miss Kelley: Mr. Mueller, are you asking for purchased transportation on the books of the Gilbertville Trucking Company?

Mr. Mueller: Of the Gilbertville Trucking Company.

The Witness: I have the answer.

Q. How much?

A. \$7,065.03 from January 1, 1956, to July 31, 1956.

Q. This is transportation purchased by Gilbertville?

A. It is the leasing of equipment, Nelson's equipment, by Gilbertville.

Exam. Baumgartner: Does it cover only equipment leased from Nelson?

The Witness: That's right, sir.

Exam. Baumgartner: And lease of no other equipment?

The Witness: That's right, sir.

By Mr. Mueller:

Q. Can you give us the converse figure, namely, purchased transportation by Nelson from Gilbertville?

[fol. 171] A. I don't think I could, because in the standard accounts it is intermingled, and to my knowledge that would be very infrequent, it would be very rare.

Q. Can we go back again to your Exhibit No. 11, Mr. Solomon, Item 4200, Transportation: \$392,578, I believe. What is included in that item?

A. Under Transportation?

Q. Yes.

A. Supervision, drivers' and helpers' wages, gasoline, oil, equipment rents, bridge and tunnel tolls, drivers' road expense. That would be it.

Q. Now, you mentioned gasoline and oil. Did you mention gasoline and oil?

A. I did.

Q. Where does Gilbertville purchase its gasoline and oil at the present time?

A. At various places.

Q. Any of it purchased from The L. Nelson and Sons Transportation Company?

A. In one place, in Newton, Massachusetts, terminal: it is purchased from there.

Q. And at no other point?

A. No other point, to my knowledge.

Q. Next let us consider Item 4300, Terminal, on Exhibit No. 11.

Exam. Baumgartner: Pardon me, Mr. Mueller, what exhibit—

[fol. 172] Mr. Mueller: Exhibit No. 11.

Exam. Baumgartner: Eleven, thank you.

By Mr. Mueller:

Q. Does that item include terminal rentals?

A. Yes, it would.

Q. Well, now, can you tell us who owns the terminal building occupied by Nelson and Gilbertville at Ellington?

A. Yes, the Bergson Company.

Q. Now, will you explain this corporation—who owns its stock?

A. Yes.

Q. Who are its directors?

Miss Kelley: This is beyond the scope of the direct examination; but, Mr. Examiner, I have no objection to it being introduced.

Exam. Baumgartner: I think it does have some connection with the direct examination.

Miss Kelley: Yes, it has.

Exam. Baumgartner: I think it does have some connection.

The Witness: Mr. Examiner, could I give the full background of this?

Exam. Baumgartner: You just answer the questions exactly as they are put to you.

Miss Kelley: Can we have the question reread?

[The question was read by the reporter as follows: "Now, will you explain this corporation—who owns its stock—who are its directors?"]

[fol. 173] Exam. Baumgartner: What he wants is the stock ownership and the names of the directors in this corporation that owns the terminal—is that right?

Mr. Mueller: That's right.

The Witness: The directors and who owns the stock: there are 490 shares of common capital stock, seventy shares held by each of the seven children.

Exam. Baumgartner: Whose children?

The Witness: Of Linnea Nelson. The names?

By Mr. Mueller:

Q. Will you name them, please?

A. Yes, sir. There is Oscar Herbert Chilberg, who is

president of the corporation; Charles Chilberg, who is vice-president and treasurer of the corporation; Clifford Nelson, who since January of this year is secretary to the corporation; Greta Nelson, who was secretary; Howard Chilberg; Kenneth Nelson; Ruth Nelson Nyberg.

Q. Is Kenneth Nelson a member of the board of directors?

A. All seven are members of the board of directors.

Q. Now, in addition to the terminal at Ellington, Connecticut, does the Bergson Company own other terminals—

A. Yes, they—

Q. —used by Gilbertville and Nelson?

A. Yes, they do.

Q. Will you describe, or, designate the points where those terminals are located, please?

[fol. 174] A. The terminals used by Nelson, as well as Gilbertville, is owned by Bergson.

Examr. Baumgartner: Will you spell that last name?

The Witness: B-e-r-g-s-o-n. It is the last of Chilberg and Nelson. The terminals used by both Nelson and Gilbertville owned by Bergson is at 25 West Road, Ellington, Connecticut; Woonsocket, Rhode Island; Newton, Massachusetts—and that would be all.

By Mr. Mueller:

Q. Is there one in Philadelphia?

A. There is a terminal owned by Bergson in Philadelphia, but Gilbertville does not rent there.

Q. It is occupied solely by—

A. Nelson.

Q. —L. Nelson?

A. Yes, sir.

Q. Do you know whether or not there is a terminal located at Monson, Massachusetts?

A. I do not.

Q. Is there a terminal on Long Island, Mr. Solomon?

A. I should know about New York, but—there is a New York terminal, and I believe you would call that part of Long Island.

Q. Is it jointly occupied, do you know, by the two companies, jointly used?

A. It is jointly used. It is not owned by Bergson Company, though.

[fol. 175] Q. Is it owned by Gilbertville or Nelson?

A. No. There is a third party that owns that.

Q. Is it owned by parties who are in any way related to the parties to this investigation?

Exam. Baumgartner: To this investigation?

Mr. Mueller: To this proceeding.

Exam. Baumgartner: This application proceeding.

The Witness: The person who owns the premises of the New York terminal is not in any way connected with either Gilbertville or Nelson's.

By Mr. Mueller:

Q. Can you tell us the proportion in which the rental is shared between the two companies at Ellington, Newton, and Woonsocket?

A. Ellington, Woonsocket, and where else?

Q. Newton.

A. Do you wish the rental charge paid by Gilbertville—

Q. I would be interested—

Exam. Baumgartner: He is just asking you for the proportions.

Miss Kelley: For clarity, can we have the rental paid by Nelson and then the—

The Witness: I'll give you the dollar amounts.

Exam. Baumgartner: If it is easier for the witness to do it that way—give them the dollar figure, if it is easier for you to do it that way.

Miss Kelley: Could you tell us if that is monthly?

The Witness: They pay it monthly. At Ellington, Nelson [fol. 176] son pays Bergson \$275 a month; Gilbertville sub-rents from Nelson at Ellington and pays Nelson \$100 per month; at Woonsocket, Rhode Island, Nelson pays Bergson \$100 per month and Gilbertville pays Nelson \$100 per month; at Newton—

Exam. Baumgartner: What was that?

The Witness: It's the same thing.

Exam. Baumgartner: Nelson pays?

The Witness: Bergson \$100 per month, and Gilbertville pays Nelson, same figure, \$100.

Exam. Baumgartner: So that it doesn't cost Nelson anything?

The Witness: That's correct.

Exam. Baumgartner: Go ahead with Woonsocket.

The Witness: That was Woonsocket, sir.

Exam. Baumgartner: Oh, I thought, that was Newton.

The Witness: No, I am coming to Newton now. It would be the same condition in Newton.

Exam. Baumgartner. A hundred dollars per month?

The Witness: A hundred dollars per month paid by Nelson to Bergson, and Gilbertville pays Nelson \$100 per month.

By Mr. Mueller:

Q. Can you tell us how long these arrangements for rental of terminals have been in effect?

A. Since January of 1956. There were other arrangements thereto.

Q. Can you tell us what those other arrangements were?

A. Yes. Prior to January 1, 1956, the rental of the Ellington terminal by Nelson, payable to Bergson, \$275 per month. Gilbertville paid Nelson for the use of the Ellington terminal \$50 per month. Woonsocket: Nelson pays Bergson \$100 per month with Gilbertville paying Nelson for the use of the Woonsocket terminal \$25 per month. At Newton: Nelson pays Bergson \$100 per month, with Gilbertville paying Nelson \$25 per month.

Q. What is the arrangement at Long Island, Mr. Solomon?

A. The Long Island terminal is: Nelson pays a third party \$500 per month, with Gilbertville paying Nelson \$250 per month.

Q. Is there some arrangement at the Gilbertville terminal at Gilbertville, Massachusetts, for joint use of the facilities?

A. To my knowledge Nelson does not use the Gilbertville

terminal at Gilbertville. It is solely used by Gilbertville alone.

Q. Now, Mr. Solomon, referring again to your Exhibit No. 11, Account No. 4400, Traffic, what sort of thing is included in that statement?

A. Sales, salaries and expense, traffic, office expense, advertising. That will be all. Tariffs would be in there.

Q. Now, you have another item on that Exhibit, No. 4560, Insurance and Safety—

Exam. Baumgartner: Is that 4560? 4500, isn't it?

The Witness: 4500.

Mr. Mueller: I'm sorry. The carbon is not clear.

By Mr. Mueller:

Q. As I understood you yesterday, you proposed some saving through the common placement of insurance for [fol. 178] the two companies—

A. Yes, sir.

Q. —assuming the proposed merger is authorized. I would like to ask you whether it is not a fact that the two companies placed their cargo and public liability and property damage insurance with the same company as at the present time?

A. I am quite certain they do not have their insurance with the same agents.

Q. Do you know?

A. I do.

Q. Can you give us the names of the companies?

A. I think I can.

Q. Will you please?

A. Gilbertville purchased its insurance from Charles Bentville of New York City, same agent who, prior to Kenneth Nelson assuming control, Gilbertville placed the insurance with; and Nelson's insurance is with Liberty Mutual. They have some with Charles Vogt.

Q. Does Liberty cover both cargo and PL and PD?

A. I am quite certain they do not. Are you assuming for both Gilbertville and Nelson?

Q. That's right.

A. No, they do not.

Miss Kelley: Can we have it clear as to which company the Liberty Mutual does provide, or if they provide both [fol. 179] cargo and PD?

Exam. Baumgartner: I understood the witness to say it provided insurance for Nelson Company.

Miss Kelley: Thank you.

The Witness: That's right, sir.

By Mr. Mueller:

Q. Who did you say covered the cargo for L. Nelson?

A. The Liberty Mutual, or Charles Vogt—v-o-g-t.

Q. Now, Mr. Solomon, in your direct testimony yesterday I believe you referred to some savings in equipment in connection with your testimony concerning Exhibit C-3 attached to the application. I would like to inquire whether any of the equipment shown on that exhibit was acquired by Gilbertville Trucking Company from L. Nelson?

A. I don't believe any of that equipment was acquired by Gilbertville from L. Nelson.

Q. You are referring now to the equipment listed on the exhibit only?

A. Yes.

Exam. Baumgartner: Exhibit C-3 attached to the application.

The Witness: The one that says encumbered property, yes.

Mr. Mueller: C-3, yes.

Q. Can you tell me whether any motor equipment was owned by the corporation, Gilbertville, when the stock was [fol. 180] acquired by the Nelsons?

A. May I have that question restated?

Q. The Gilbertville Trucking Company at that time owned some motor vehicle equipment?

A. Gilbertville Trucking did own equipment.

Q. Did that equipment go with the purchase of the stock?

A. That's right; that is included in the \$35,000.

Q. Subsequently, was any motor vehicle equipment purchased by Gilbertville from L. Nelson and Sons?

A. To my knowledge, none.

Q. Do you have charge of the equipment records of the two companies?

A. By "charge" I presume—

Q. Well, you have access to them, don't you?

A. That's correct.

Exam. Baumgartner: Well, he meant to say: do you have custody of them. I presume that is what you meant.

The Witness: I have detailed depreciation schedules of each.

Exam. Baumgartner: No. The question is: do you have custody of the books and records of the company?

The Witness: I supervise the books and records, but I do not have custody.

Exam. Baumgartner: You do not?

The Witness: No, sir.

By Mr. Mueller:

Q. Do you know what Kenneth A. H. Nelson's employ- [fol. 181] ment was between the time that he sold his stock in The Nelson Company and the time he purchased his stock in the Gilbertville Company?

Miss Kelley: I object to the question as not being related to the finance case, as beyond the scope.

Exam. Baumgartner: Can you tie that in with anything that was testified to on direct examination?

Mr. Mueller: Well, the gentleman testified yesterday that at the time he sold his stock that he owned and that he inherited, I believe, he severed his connections with The L. Nelson Transportation Company.

Exam. Baumgartner: That is what I understood.

Mr. Mueller: Now I am directing my question to that statement.

Exam. Baumgartner: Well, why don't you ask him that question?

By Mr. Mueller:

Q. Did he in any fashion, Mr. Solomon, continue in the employ of The L. Nelson Transportation Company?

A. In the sense of an employee: he was not—he was a

free lance tariff consultant, rendering bills periodically to Nelson.

Q. For services performed for Nelson?

A. That's right, sir.

Q. After he purchased the Gilbertville stock, did Kenneth Nelson move his headquarters?

Miss Kelley: I object to this, too. This is not within the scope of the direct examination and is certainly not [fol. 182] related to the finance case.

Exam. Baumgartner: Oh, I think it is. I will overrule the objection.

The Witness: Kenneth Nelson's office still remained. The Gilbertville Trucking Company main office still was conducted in Ellington, Connecticut.

Mr. Mueller: That is all.

[fol. 183] By Mr. Keenan:

Q. Mr. Solomon, you have been authorized, have you not, by the management of both Gilbert Trucking Company and L. Nelson and Sons to appear in their behalf in this proceeding?

A. That's right, sir.

Q. And do I recall your testimony correctly that you have had conversations with the personnel comprising the present management of each of these companies concerning the acquisition by the present management of Gilbert Trucking Company, of its control of Gilbert Trucking Company?

A. I did have conversations with them.

[fol. 186] Exam Baumgartner: No. The question was whether you were instructed to refrain from disclosing information.

The Witness: I was not instructed.

By Mr. Keenan:

Q. Were you thus instructed, Mr. Solomon, to refrain from disclosing information by anyone who is a member of

the management personnel of Gilbert Trucking Company, Inc.?

Miss Kelley: I object. That is repetitious.

Exam. Baumgartner: This is with respect to Gilbertville, now.

Q. Gilbertville Trucking Company, Inc.?

A. The answer is the same: No.

Q. Then just to make sure I understand you completely, sir, that means that at no time Oscar Herbert Chilberg ever gave you any such instructions, right?

A. That's right, sir.

Q. The same is true of Charles Chilberg?

A. That's right.

[fol. 187] Q. Kenneth Nelson?

A. That's right.

Q. Clifford Nelson?

A. That's right.

Q. Do you consider yourself to be a member of the management of L. Nelson and Sons, Inc.?

A. No, sir.

Q. Do you consider yourself to be a member of the management of Gilbert Trucking Company, Inc.?

A. No, sir.

Q. Gilbertville Trucking Company, Inc.?

A. No, sir.

Q. Therefore, am I correct in concluding that you are not in a position to speak authoritatively for the management of either of those companies?

Exam. Baumgartner: With respect to what matters, now?

Mr. Keenan: With respect to any matters.

Exam. Baumgartner: That is too broad a question.

Mr. Keenan: The Examiner instructs me not to ask it?

Exam. Baumgartner: No, the Examiner asks you to limit your question to the inquiry that is at hand, sir.

Mr. Keenan: Very well, sir.

By Mr. Kelley:

Q. Am I correct in understanding, then, Mr. Solomon, that you are not authorized to speak for the management of either of these companies with respect to their plans [fol. 188] for use in the future of the merged authorities, approval of merger which is sought in this proceeding?

Miss Kelley: I object to the question for the purpose of clarification. Are you referring to operational matters or finance matters?

Mr. Keenan: If the Examiner please, I don't care to answer counsel's question, except with the Examiner's permission or by the Examiner's direction.

Exam. Baumgartner: Well, let's take it up piecemeal. Will you limit your question first to operational matters—

Mr. Keenan: I shall be glad to.

Exam. Baumgartner: —future operational matters of the merged company.

Mr. Keenan: I shall be glad to.

By Mr. Keenan:

Q. Are you authorized to speak for the management of either of these companies with respect to the future operational use which will be made of the merged operation?

A. I am not.

Q. Are you authorized to speak for either of these companies, for the management of either of these companies, with respect to the future plans for financing any operations to be conducted as a result of the merger?

A. I am not.

Exam. Baumgartner: What do you mean by future plans for financing, Mr. Keenan?

[fol. 189] Mr. Keenan: Mr. Examiner, I have in mind that often when unifications occur of carriers, it is necessary to obtain additional equipment or to readjust equipment rosters.

Exam. Baumgartner: That has nothing to do with finance.

Mr. Keenan: I was going on to say that such changes or adjustments frequently require new capital, and the obtaining of such new capital would in my lexicon constitute new financing.

Exam. Baumgartner: I understand now what you are driving at.

By Mr. Keenan:

Q. Did I understand you to mean that, Mr. Solomon?

A. Yes.

Q. Now, in the past, Mr. Solomon, since January of 1949 —let me withdraw that question for the moment.

If I were to use the phrase: "Making executive decisions," in a question to you, what would you understand me to mean by that?

A. Yes. Decisions of policy.

Q. All right, sir. Now, since January of 1949, have you made or helped to make decisions of policy with respect to the operations or conduct of the business of L. Nelson and Sons, Inc.?

A. I have given recommendation as to the financing of the business.

Q. In the future do you expect to continue to make such recommendations if you retain your present relationship [fol. 190] with L. Nelson and Sons, Inc.?

A. That is correct.

Q. At any time in the past have you made such recommendations with respect to the affairs of Gilbert Trucking Company, Inc.?

A. Directly to Kenneth Nelson of Gilbertville Trucking, yes.

Q. When did you begin to make such recommendations with respect to the affairs of Gilbertville?

A. As soon as Kenneth Nelson started negotiations for Gilbertville Trucking Company.

Exam. Baumgartner: Negotiations for the purchase of the stock?

The Witness: Purchase of the capital stock, yes, sir.

Exam. Baumgartner: You made those recommendations to whom?

The Witness: Kenneth Nelson.

Exam. Baumgartner: But not to Gilbertville Trucking?

The Witness: Not to Gilbertville Trucking, no, that's right.

By Mr. Keenan:

Q. Did those negotiations begin January 19, 1953?

A. That would be the date, approximate date; yes, sir.

Q. Aside from whether it would be the date, was it the approximate date?

A. I said it is the approximate date.

Q. Do you expect in the future to continue to make such recommendations to any members of the personnel of the management of Gilbertville?

[fol. 191] A. Yes, sir.

Exam. Baumgartner: What was that question, again?

Mr. Keenan: Does the Examiner want me to repeat or the reporter to read it?

Exam. Baumgartner: Well, it probably would be a little quicker for you to repeat it.

Mr. Keenan: Does the witness expect in the future to continue to make such recommendations to the management of Gilbertville?

Exam. Baumgartner: He just denied that he made any recommendations to the management of Gilbertville.

Isn't that right, Mr. Witness?

Mr. Keenan: No, I didn't understand him to do so.

Exam. Baumgartner: I mean—I'm sorry. I'm mistaken. He did testify that he made recommendations to Mr. Kenneth Nelson after he assumed control of Gilbertville; that's correct?

The Witness: Right, sir.

Exam. Baumgartner: Now your question, is that premised upon a denial of the application for a merger and a continuance of Gilbertville as a separate entity?

Mr. Keenan: My question sought to determine what the witness' expectation was, if the Examiner please.

Exam. Baumgartner: With respect to Gilbertville as a continuing separate entity?

Mr. Keenan: No, sir, with respect to Gilbertville under [fol. 192] whatever circumstances may characterize its existence.

Exam. Baumgartner: Well, with this merger it disappears.

Mr. Keenan: I suppose that is true. Shall I continue?

Exam. Baumgartner: Yes.

By Mr. Keenan:

Q. In the course of your direct examination, Mr. Solomon, I was able to make partial notes concerning the stock transfers you spoke of. I should like in the next two or three questions to supplement the information I have in my notes. I don't think it's in the transcript yet. Am I correct in understanding that in January of 1949 the stock of L. Nelson and Sons was owned by Linnea Nelson—Mrs. Linnea Nelson—Oscar Chilberg, Charles Chilberg, Kenneth Nelson, and Cliff Nelson, and Howard Chilberg, and by no one else?

A. That's incorrect.

Mr. Keenan: Strike out Howard Chilberg. I was in error.

The Witness: Right.

Q. Striking Howard Chilberg, is it a correct statement?

A. Right, sir.

Q. At some time during 1949, am I correct in understanding that Mrs. Linnea Nelson's stock interest was reduced from 496 shares to 300 shares?

A. That is correct, sir.

Q. Would you give me your best recollection, or, the best information you can obtain from the records you have with [fol. 193] you as to when in 1949 this reduction in the stock owned by Mrs. Linnea Nelson took place?

A. Last night I had a chance to look up the stock book on my testimony which I stated as 1949. The exact date is May 14, 1948, that Linnea Nelson gave to each of four children forty-nine shares apiece.

Q. Do you have that stock book with you?

A. The stock book was supposed to have been brought here.

Miss Kelley: I have the stock book, Mr. Examiner.

Q. Will you show me the entry in the stock book that indicates that to be the truth?

Exam. Baumgartner: Off the record.

[Discussion off the record.]

Exam. Baumgartner: Back on the record now.

Let the record show that counsel, Mr. Keenan, was permitted to inspect the stock record book of The L. Nelson and Sons Transportation Company.

Mr. Keenan: And I am further glad to stipulate that it reflected the exact accuracy of the witness' previous testimony.

Exam. Baumgartner: Thank you.

By Mr. Keenan:

Q. Is it correct, sir, that this corporation, L. Nelson and Sons, Inc., was formed February 7, 1948?

A. That is correct.

Q. And then your answer to my previous question, my first question with regard to stock ownership, was in error, [fol. 194] was it not: on January of 1949?

A. That's right. I did state that was in error.

Q. No, sir, your answer to the question was correct, if I recall. I didn't ask you the exact number of shares owned. Now, on February 7, 1948, between February 7, 1948, and May 14, 1948, the distribution of shares was as follows, is this not correct: 496 shares with Linnea Nelson, one share with Osear Chilberg, one share with Charles Chilberg, one share with Kenneth Nelson, one with Clifford Nelson?

A. That is correct, sir.

Q. Then as of—and correct me if I'm wrong about this—May 14, 1948, Linnea Nelson's interest was reduced to 300 shares?

A. Right, sir.

Q. Oscar Chilberg's interest increased to fifty shares? Charles Chilberg's—

The Examiner: Don't shake your head. Say yes.

The Witness: Yes, sir.

Q. Charles Chilberg to fifty shares?

A. Yes, sir.

Q. Kenneth Nelson to fifty shares?

A. Yes, sir.

Q. Clifford Nelson to fifty?

A. Yes, sir.

Q. On January 5, 1950, Mrs. Linnea Nelson passed away, correct?

[fol. 195] A. Yes, sir.

Q. Did any change in the distribution of stock ownership of L. Nelson and Sons occur between May 14, 1948, and January 5, 1950, so far as your records permit you to determine?

A. There was no change in those dates.

Q. Now, as I recall your previous testimony, you told us that approximately on June 30, 1951, a further change did take place?

A. Yes, sir.

Q. My next question to you is: At any time between January 5, 1950, and June 29, 1951, did any change take place in the distribution of stock ownership of L. Nelson and Sons?

A. No change took place in the stock distribution.

Q. Is my understanding correct that on June 30, 1951—well, withdraw that question.

Of course, on January 5, 1950, the 300 shares of stock theretofore owned by Mrs. Linnea Nelson accrued to the estate of Mrs. Linnea Nelson, right?

A. That is correct.

Q. On June 30, 1951, is it correct that the estate of Mrs. Linnea Nelson owned 300 shares?

A. That's right, sir.

Q. Oscar Chilberg owned no shares?

A. Oscar Chilberg had no shares, that's right, and the estate still had three hundred shares.

Q. Charles Chilberg owned 100 shares?

[fol. 196] A. Charles Chilberg then owned 100 shares, correct.

Q. Kenneth Nelson owned fifty?

A. That is correct.

Q. Clifford Nelson owned fifty?

A. No. Clifford Nelson—I'm sorry, you are right.

Q. June 30, 1951?

A. Kenneth Nelson only had fifty shares.

Q. And Clifford Nelson only had fifty?

A. That's right, sir.

Q. As of June 30, 1951, even though Oscar Chilberg no longer owned any shares of L. Nelson and Sons, Oscar Chilberg was an executor of Mrs. Linnea Nelson's estate, correct?

A. That's right, sir.

Q. Therefore he had the power to participate in the voting of the 300 shares of stock owned by the estate, correct?

A. Right, sir.

Q. At that time, June 30, 1951, Charles Chilberg was not only an executor of that estate, but he was also an employee and a director of L. Nelson and Sons, was he not?

A. That is right.

Q. I speak of the date June 30, 1951.

A. Yes, sir.

Q. On that date Kenneth Nelson was a director, is that correct?

A. That's right.

Q. On that date Clifford Nelson was a director?

[fol. 197] A. Right.

Q. Now, between February 7, 1948, and June 30, 1951, am I correct in understanding that none of the following people owned any shares of L. Nelson and Sons: Howard Chilberg, Ruth Widham—is it Greta Carlson?

A. Greta Nelson Carlson, right—her marriage name.

Q. Phyllis Nelson, a man named Kashady, and a man named Paroshinsky—none of those people owned any shares in this corporation?

A. In the Nelson corporation?

Q. In the Nelson corporation as of June 30, 1951?

A. None of them owned any shares.

Q. However, on February 7, 1948, Howard Chilberg was a director, was he not?

A. Howard Chilberg a director?

Q. Yes.

A. He was not a director.

Q. He was an employee?

A. That's correct.

Q. He was an employee on May 14, 1948, was he not?

A. Yes.

Q. Was he an employee on June 30, 1951?

A. That's right, he still was an employee of Nelson's, Howard Chilberg was.

Q. On June 30, 1951, is it correct that Ruth Widham [fol. 198] was an executor of Mrs. Linnea Nelson's estate?

A. That is correct.

Q. With the power to contribute to the voting of the 300 shares of stock owned by that estate that you and I have previously discussed?

A. That is correct.

Q. On September 22, 1951, is it correct that the estate continued to own 300 shares?

A. That is correct.

Q. Oscar Chilberg owned no shares?

A. That's right.

Q. However, he continued to be an executor of the estate, right?

A. That's right, sir.

Q. Charles Chilberg owned 150 shares on September 22, 1951? Is that correct?

A. September 22, 1951? No, Charles Chilberg does not have 150 shares. He still continued at 100 shares.

Q. I see. How many shares on that date does Kenneth Nelson own?

A. You are referring now to September 22, 1951?

Q. That's correct.

A. When Kenneth Nelson sold his fifty shares to Clifford Nelson—I think that would correct it.

Q. On September 22, 1951, Charles Chilberg owned 100 shares, is that correct?

[fol. 199] A. That's right, sir.

Q. He continued to be a director of the corporation on that date, correct?

Miss Kelley: Who?

Mr. Keenan: Charles Chilberg.

The Witness: Yes, Charles Chilberg.

Q. On that date Kenneth Nelson owned no shares, correct?

A. That is right, sir.

Q. He ceased to be a director of the corporation on that date?

A. Yes, sir.

Q. He also ceased to be an officer and an employee, is that correct?

A. That is right, sir.

Q. On September 22, 1951, Clifford Nelson owned 100 shares of the corporation, correct?

A. Right, sir.

Q. He continued on that date to be a director of the corporation?

A. Correct.

Q. On September 22, 1951, Howard Chilberg owned no shares?

A. That is correct.

Q. He continued to be a director?

A. Yes, sir.

Q. Ruth Widham owned no—

Miss Kelley: Wait a minute. Did you hear that last question and answer?

[fol. 200] The Witness: Yes.

Miss Kelley: On Howard Chilberg?

Mr. Keenan: Excuse me, Miss Kelley.

May counsel be directed to address the Examiner and ask the Examiner's permission to—

Miss Kelley: Mr. Examiner, may I ask the witness if he understood the last question, because I believe he is confused on the names; and it is my understanding—

Exam. Baumgartner: Did you understand that last question?

The Witness: Yes. He said Howard Chilberg—

Miss Kelley: Was a director on September 22.

The Witness: And I said: no, he was not.

Miss Kelley: I understand you to say: yes, he was a director.

Mr. Keenan: So did I. Thank you, Miss Kelley.

By Mr. Keenan:

Q. Howard Chilberg on September 22, 1951, was not a director?

A. That's right; never at any time.

Mr. Keenan: Oh, I am sorry. That was very misleading of me. I apologize. It was inadvertent.

Q. You have previously told us Howard Chilberg was an employee?

A. That's right.

Exam. Baumgartner: Just a moment. Aren't we interested in the nature of his employment with the company?

Mr. Keenan: Yes, sir. I expect to inquire into that as [fol. 201] soon as I have gotten the picture.

Exam. Baumgartner: Excuse me.

By Mr. Keenan:

Q. Now, he continued to be an employee on September 22, 1951, is that correct?

A. That's right, sir.

Q. And on that date Ruth Widham continued to be an executor of Mrs. Linnea Nelson's estate, right?

A. That is right, sir.

Q. Otherwise she had no relationship to the corporation?

A. That is right.

Q. And Greta Carlson, Phyllis Nelson, Kashady and Paroshinsky had nothing to do with the corporation on that date?

A. No, never.

Q. Now, if I recall your direct testimony correctly, something happened on December 31, 1952, with respect to the Linnea Nelson estate. Will you tell me what?

A. Yes. The Linnea Nelson estate was closed as of December 31, 1952, and the 300 shares of stock held by the estate was then distributed.

Q. Now, do your stock records reflect that?

A. The stock records—I believe they do.

Q. Will you show me the certificate cancellation for the 300 shares of stock theretofore owned by the estate?

Is this it?

A. Yes.

[fol. 202] Q. Well, Mr. Solomon, my question was: do you have in your stock records a notation of cancellation of a stock certificate for 300 shares in the corporation theretofore owned by the estate of Mrs. Linnea Nelson?

A. The stock book shows it cancelled here.

Q. And on what date is it shown to be cancelled in your stock book?

A. Yes, sir. January 24, 1953.

Q. Now I invite you to recall the testimony you just gave me to the effect that the 300 shares of stock in the estate were distributed on December 31, 1952. Do you desire to change that testimony?

A. No. We did say that the estate was closed as of December 31, 1952. However, for the legal procedure it took until January 24, 1953, before anybody actually received the stock. But the estate was actually closed on December 31, 1952.

Q. When you say closed, what do you mean by that verb?

A. Liquidated, where the judge of probate approves of the final accounting.

Q. Do you recall seeing an order from the Probate Court discharging the executors of responsibility on that date, or effective?

A. I wouldn't know the ~~exact~~ date, but it was approximate.

Q. I just wondered why you came up with the date: December 31, 1952, as the date the estate closed?

[fol. 203] A. Yes.

Q. How do you know it was?

A. I was the one who prepared the final accounting for the estate as of that date.

Q. That was the date the final accounting was filed in the Probate Court?

A. That's right, and they accepted it.

Exam. Baumgärtner: The final accounting closed as of December 31, is that what I am to understand?

The Witness: That's right, sir.

Exam. Baumgärtner: But not the estate?

The Witness: In my opinion, it was the estate that closed as of December 31, 1952.

Exam. Baumgartner: You just got through saying that there were some steps necessary to be taken after December 31 in connection with the transfer of stock?

[fol. 204] By Mr. Keenan:

Q. Mr. Solomon, do you supervise the keeping of that stock book?

A. No, I do not; no.

Q. Do you consider yourself competent, sir, to explain the significance of entries in the stock books of L. Nelson and Sons, Inc.?

A. I think I am.

Exam. Baumgartner: To what extent?

Q. To what extent?

A. Not any of the legal content, but as to the ownership of stock.

[fol. 207] By Mr. Keenan:

Q. On January 23, 1953, according to the stock book, who had control of those 300 shares?

A. The estate that was in the process of winding up. As I said, as of December—

Q. That is enough.

A. —31, 1952.

Q. All right.

Q. What was the pattern of distribution recognized by the Probate Court, finally, of these 300 shares? Forty-two shares to each of seven children, if I recall correctly?

A. That's right, sir.

Q. Five of those children, am I correct in understanding, were Oscar Chilberg, Charles Chilberg, Kenneth Nelson, Clifford Nelson, and Howard Chilberg?

A. That's right, sir.

Q. Were the other two children Ruth Widham and Greta N. Carlson?

A. That's right, sir.

Q. Was the estate at any time thus distributed to the legatees?

Miss Kelley: I object to the—

Q. Is the question clear?

Miss Kelley: —form of the question.

If you put it—instead, if you would state to me what [fol. 208] you meant by legatees?

Q. Oh, was the estate at any time thus distributed to the seven people we have just talk about?

Is there objection?

Miss Kelley: No.

The Witness: It was distributed on January 24, 1953.

Q. January 24, 1953?

A. That is correct.

Q. So that, after that distribution on January 24, 1953, am I correct in understanding that the estate of Linnæ Nelson owned no shares in the corporation?

A. That is correct.

Q. Oscar Chilberg owned forty-two shares in the corporation?

A. Right, sir.

Q. Charles Chilberg owned 142 shares?

A. That is correct.

Q. Kenneth Nelson owned forty-two shares?

A. That is right, sir.

Q. Cliff Nelson owned forty-two—

A. No; no, Cliff Nelson—

Q. Excuse me. Cliff Nelson owned 142?

A. That is right.

Q. Howard Chilberg owned forty-two?

A. That is right, sir.

Q. Ruth Widham owned forty-two, is that right?

[fol. 209] A. Right.

Q. And Rita Carlson owned forty-two?

A. Right.

Q. At some time did the number of shares owned by Kenneth Nelson decrease, thereafter?

A. The number of shares owned by Kenneth Nelson was sold by him—

Q. Excuse me, sir. Will you answer the question? The question calls for a yes-or-no answer. At some time did the number of shares owned by Kenneth Nelson there-after—

A. Yes.

Q. —decrease?

A. Yes.

Q. When? What date?

A. January 24, 1953.

Q. As the result of that decrease, whose ownership of shares increased? In other words, to whom did Kenneth Nelson transfer his forty-two shares?

A. I'll have to see that book. Yes, sir, I am able to answer that question now.

Q. Sir?

A. I am able to answer that question now.

Q. Will you do so?

A. The forty-two shares that were owned by Kenneth Nelson were then sold to Clifford Nelson.

[fol. 216] Q. Now, does your stock book reflect Kenneth Nelson's acquisition of those forty-two shares on January 24, 1953? Is the answer yes?

A. Yes, it does.

Exam. Baumgartner: Well, let the record show that counsel for both parties and the witness are inspecting the stock record.

By Mr. Keenan:

Q. Now, your records reflect that those forty-two shares went to Charles Chilberg, is that correct?

A. No, it does not.

Q. No, it does not; you are right.

A. It went to—

Q. It went to—

A. —Clifford Nelson.

Q. —Clifford Nelson, yes.

A. That's right, sir.

Q. As a result of that transfer, Clifford Nelson had 142 shares in the corporation, right?

A. That is right.

Miss Kelley: Check your figures—Mr. Examiner, do you mind, I think—

The Witness: That's right, mathematically I think I'm wrong there. The fifty, forty-two and forty-two, would not be the figure we are talking about. It's 134 shares.

Exam. Baumgartner: That was in the ownership of Clifford?

[fol. 211] The Witness: Clifford would have 184 shares at that time.

Miss Kelley: That would have to be cleared.

By Mr. Keenan:

Q. Mr. Solomon, I think a source of confusion may be that I have only inquired about Kenneth Nelson's forty-two shares and what happened to them on January 24, 1953.

A. Kenneth Nelson does not have any more shares after January 24, 1953.

Q. Kenneth Nelson transferred his forty-two shares to Cliff Nelson, right?

A. That is right, sir.

Q. Theretofore Cliff Nelson had had 100 shares, had he not?

A. He had a hundred plus forty-two that he received from the estate, is 142.

Q. Of course you are right, 184; right?

A. That is right, 184 shares.

Q. Now, on January 24, 1953, did anybody other than the estate of Linnea Nelson and Kenneth Nelson transfer any shares?

A. Yes.

Q. Who?

A. Oscar Herbert Chilberg sold his forty-two shares.

Q. And who did he transfer them to?

A. To Charles Chilberg.

Q. Does that mean that Charles Chilberg owned 184 shares on that date, after that transfer had been executed?

A. That is right.

Q. Did any other such transfers take place on January 24, 1953?

[fol. 212] A. No other on that particular date.

Q. Then, to sum up the distribution of the stock ownership at midnight on January 24, 1953, is it correct to say that the estate of Linnea Nelson owned none, Oscar Chilberg owned none, Charles Chilberg owned 184—am I going too fast?

A. No, that's all right.

Q. Kenneth Nelson owned none, Clifford Nelson owned 184, Howard Chilberg owned forty-two, Ruth Widham owned forty-two, and Rita Carlson owned forty-two? Is that correct? Would you like that repeated?

A. That is correct, sir. Now, that you will find is six shares less than 500 shares.

Q. So there were remaining on midnight of January 24, 1953, six shares of stock, right?

A. Yes.

Q. And those were transferred by the estate of Linnea Nelson, were they, to the corporation itself?

A. The corporation purchased it for \$600.

Q. Now, at any time between January 24, midnight of January 24, 1953, and February 27, 1953, did any change in the distribution of stock ownership of this corporation take place?

A. No, there was none.

Q. On February 28, 1953, there was such a change, was there not?

A. Yes, sir.

[fol. 213] Q. Will you tell me what that change was?

Exam. Baumgartner: Off the record for a moment.

[Discussion off the record.]

Exam. Baumgartner: Back on the record, now.

The Witness: I can answer that. On February 28, 1953, Ruth Widham, who is now Mrs. Nyberg, sold her forty-two shares distributed as follows: twenty-one to Clifford Nelson and twenty-one to Charles Chilberg.

[fol. 214]

By Mr. Keenan:

Q. Now, as the result of Mrs. Nyberg's sale, or transfer rather, of stock, is it true that Clifford Nelson held on February 28, 1953, 205 shares of Nelson and Company stock?

A. Two hundred five would be correct, sir.

Q. And that Charles Chilberg held 305 such shares on that date?

A. No, not 305—205.

Q. Two-o-five?

A. Right.

Q. Were there any other such stock transfers which occurred on February 28, 1953?

A. No, there are not. I testified yesterday that Howard Chilberg sold his shares at that time, but looking at the stock book before the recess I see where his shares were sold on March 14, 1953.

Q. So on February 28, 1953, the estate held none and Oscar Chilberg held none, Charles Chilberg held 205, Kenneth Nelson had none, Cliff Nelson had 205, Howard Chilberg had forty-two, Ruth Widham—Mrs. Nyberg—had none, Rita Carlson had forty-two, and the corporation had six?

[fol. 215] A. That is correct, sir.

Q. Now, on March 1, 1953, it is true, is it not, that Kenneth Nelson acquired control of Gilbertville?

A. That is correct, sir.

Q. The stock distribution on March 1, 1953, according to your records, is the same as that we have just discussed at the close of business on February 28, 1953, is it not?

A. That is correct.

Q. On April 1—withdraw that.

What was the next date—

A. March 14, 1953.

Q. On March 14, 1953, another stock transfer took place, and Howard Chilberg transferred some stock, right?

A. That is correct, sir.

Q. Did he transfer all of his forty-two shares?

A. That is right.

Q. To whom did he transfer them?

A. Twenty-one shares to Charles Chilberg and twenty-one shares to Clifford Nelson.

Q. Now, to recapitulate, on March 14, '53, Oscar Chilberg had none, Charles Chilberg had 226, Kenneth Nelson had none, correct?

A. That is right, sir.

Q. Clifford Nelson had 226, Howard Chilberg had none, Mrs. Nyberg had none, Rita Carlson had forty-two, and [fol. 216] the corporation had six?

A. That is right, sir.

Mr. Keenan: I had some notes prepared with regard to this, but the additional information we have worked up has run off my page. I have got to take a minute to set up another one.

Q. Now, between March 14, 1953, and April 1, 1954, do your records disclose that the stock distribution which you have just given me changed in any way?

A. No, they have not.

Q. On April 1, 1954, was there a change in the stock distribution of L. Nelson and Sons?

A. No, there has not been any change.

Q. On April 1, 1954, Oscar Chilberg did something to affect his relationship to Gilbertville, is that correct?

A. That is right, sir.

Q. But no change occurred in the stock distribution of Nelson and Sons?

A. No, there has not been any.

Q. Now, since March 14, 1953, has there been any change whatsoever in the stock distribution of The Nelson and Sons' stock?

A. There has been no transfers of any stock since March 14, 1953 in Nelsons.

Q. Now, on December 31, 1953, had you familiarized yourself, or had occasion to familiarize yourself, rather, with the financial statements reflecting the financial position [fol. 217] of both Gilbertville and L. Nelson?

A. That is right.

Miss Kelley: Mr. Keenan, could I have that date you mentioned?

Mr. Keenan: December 31, 1953.

Miss Kelley: Thank you.

[fol. 234] By Mr. Keenan:

Q. Mr. Solomon, I show you—well, let me ask: Were you associated with Gilbertville at the time it acquired the Wolff's Express Company, Certificate No. MC-64627?

A. Wolff was acquired after March 1, 1953, yes.

[fol. 235] Q. Well, this was some time in May, 1954?

A. It was.

Q. Now, do you happen to know whether it is true that on April 28, 1954, when Kenneth Nelson filed an application with the Commission requesting approval of that certification, acquisition, that the statement made in that application that the transferor, Gilbertville, had eight vehicles is correct? In other words—

A. April?

Q. That is April 28, 1954. This was the reason for my first question to you.

A. Yes, it would be substantially correct.

Q. That is an answer that is sufficient.

Miss Kelley: For clarification—

Exam. Baumgartner: Let me ask now: How were those vehicles counted?

Mr. Keenan: I should be glad to place that in the record, if the Examiner cares to have that, subject to correction by the witness.

Exam. Baumgartner: I would like to have the record note the information sought.

By Mr. Keenan:

Q. Mr. Solomon, am I correct in noting on this application that it reflects three tractors—wait a minute.

A. There's an error in addition there.

Miss Kelley: There is no error in addition. May I explain, Mr. Examiner, that this application shows three tractors and eight semi-trailers, but for the computation for the Commission, under these, we compute the number of units that the Commission would consider it, so the three tractors and three trailers are considered as one complete unit; and, of course, the excess trailers—

Exam. Baumgartner: That is what I am getting at.

Mr. Keenan: Three tractors and three semi-trailers, I would stipulate if counsel cares to.

Exam. Baumgartner: Which would make a total of eight complete units for the purpose of the application?

Mr. Keenan: Yes, sir.

Miss Kelley: That's right.

By Mr. Keenan:

Q. Well, in all there were eleven units, then, in April of 1954?

A. I would say that is substantially correct.

Q. Which Gilbertville owned?

A. Yes, sir.

Q. Or used?

A. Right.

Q. Then, in August of 1955 there were twenty units, twenty units of rolling equipment, which Gilbertville owned? I am now referring to the application in this proceeding which was—

Exam. Baumgartner: Which part of the application?

Mr. Keenan: I am just wondering about my date now, [fol. 237] Mr. Examiner.

Mr. Barrett: August 27.

Mr. Keenan: Is that when it was filed? I am referring, Mr. Examiner, to Page 2, Paragraph 3.

Exam. Baumgartner: I have it now, yes.

By Mr. Keenan:

Q. Do you confirm the accuracy, Mr. Solomon, of what is stated in the application in this proceeding?

A. I do not have the date of August, but the year and dates that I do have here, I would say is substantially correct.

Q. Now, you do have the year and dates?

A. Yes, sir.

Q. Would you give me the number of units of equipment which Gilbertville had at the end of 1954?

A. Twelve units at the end of 1954.

Q. At the end of '55?

A. End of '55, twenty-four units.

Q. So that is—

Exam. Baumgartner: Now, just a moment. When you speak of units, do you speak of a tractor as being one unit and a trailer being another unit?

The Witness: That is right, sir.

Exam. Baumgartner: All right, that will clarify the record.

Mr. Keenan: Thank you, Mr. Examiner.

By Mr. Keenan:

Q. So to sum this information up, Mr. Solomon, is it correct to say that Gilbertville's equipment has increased [fol. 238] from eleven units in April of '54 to twelve units in December of '54 to twenty units in August of '55 to, what was your final figure?

A. Twenty-four units, December of '55.

Exam. Baumgartner: Now just a moment, while we are on the subject. Are you referring to units that are owned by Gilbertville Trucking?

The Witness: That is right, sir.

Exam. Baumgartner: Not-leased?

The Witness: Not leased.

Exam. Baumgartner: Owned?

The Witness: Owned.

[fol. 243] By Mr. Keenan:

Q. Mr. Solomon, would you tell me from how many sources Gilbertville has acquired its equipment since 1953, its new equipment, sir?

[fol. 244] A. New equipment, well, the tractors were always bought at International.

Exam. Baumgartner: You mean International Harvester?

The Witness: Harvester. However, it could be the International Harvester at Albany, or some other place.

Mr. Barrett: May we go off the record?

Exam. Baumgartner: Off the record a moment.

[Discussion off the record.]

Exam. Baumgartner: Back on the record now.

Now can you complete your answer, Mr. Solomon?

The Witness: Yes, I can also complete his original question, too, I believe.

Exam. Baumgartner: Well, answer the question that is now before you, and then go back to the earlier question if he still wants an answer to it.

The Witness: Your question was: who do they purchase their equipment from?

Exam. Baumgartner: Since what date?

Mr. Keenan: March 1, 1953.

Exam. Baumgartner: Since March 1, 1953.

The Witness: All the Internationals would be bought from International Harvester, meaning all the trucks and tractors. Stright trucks and tractors are all purchased from International Harvester. Trailers were purchased from Strick and Freuhauf.

Exam. Baumgartner: Who is that first one?

[fol. 245] The Witness: Strick—s-t-r-i-c-k.

By Mr. Keenan:

Q. The other question which I asked you, which you said you are now able to answer, is: how many new units of equipment—I don't mean new—how many units of equipment were acquired by Gilbertville since March 1, 1953?

A. To December 31, 1955, I believe?

Q. Well, of whatever dates you can bring it up, Mr. Solomon?

A. It's twenty-two units.

Q. That is between March 1, '53, and December 31, '55, right?

A. That is correct.

Q. Now, this twenty-two units for this period we have been discussing includes all units acquired by Gilbertville, whether new or used, is that right?

A. That is right, sir.

Q. Now can you—

Exam. Baumgartner: When you use the word "acquired" you mean purchased?

The Witness: That is right, sir.

By Mr. Keenan:

Q. Now, Mr. Solomon, have you a record which is the basis for your calculation that twenty-two units were acquired?

A. Yes, I have a rough record here. I went to the corporation tax return of each year to look at what units were traded in or sold, and by merely subtracting from the year [fol. 246] end inventory, that is how I acquired that information.

Q. Oh, you did that for the entire year 1953 to start with, then, right?

A. I began as of March 1, 1953, and went all the way to December 31, 1955.

Q. I see, but you told me you went to the tax return: Gilbertville's taxable year, does it begin January and end December?

A. That is right, sir.

Q. Or does the tax return reflect the dates of acquisition?

A. The date of acquisition, I was speaking about the equipment that was sold or traded in during that time.

Q. Sold by whom?

A. And I merely subtracted from the inventory figures we have here.

Q. Sold by whom?

A. Sold by Gilbertville or traded in.

Q. I see. Well, Mr. Solomon, what are the figures you used in this arithmetical subtraction, computation, by which you decided how much new equipment Gilbertville acquired during 1953, after March?

Mr. Keenan: I might note, Mr. Examiner, that I am going at this a little clumsily because I don't want to ask to look at the income tax files that the witness is referring to, which I think are properly confidential information of the applicant.

The Witness: As of March 1, 1953, there were eight units.

[fol. 247] Q. Yes?

A. As of December 31, 1955, there were twenty-four units.

Q. Yes?

A. That would indicate an increase of sixteen.

Q. Yes?

A. And in that period six units were either traded in or sold, and I am assuming they were used to purchase new equipment with.

Q. Right. Now, what is the source of your information which leads you to believe that all tractors and Stright trucks were purchased from International?

A. The bills from International Harvester.

Q. Now, were those purchases made directly from the manufacturer, or were they made from a distributor?

A. It's the International Harvester dealership. Whether or not that is the direct factory or it's a representative of the factory, I do not know.

Q. Were the purchases of trailers from Strick and Freuhauf made from the manufacturer or from a dealer?

A. To my knowledge the purchases from Freuhauf or Strick were usually made from the manufacturer.

Q. When you say to your knowledge, do you mean so far as your knowledge permits you to reach a conclusion?

A. That's right, without now looking it up to find out exactly who they bought it from. I would need the purchase invoice, and I am trusting to my memory. I would like to, [fol. 248] if I may, make a correction. I find on February 4, 1953, a trailer was sold that I should not have used in my computation here. Therefore, the pieces of additional equipment purchased since 1953—

Exam. Baumgartner: Since March 1?

The Witness: Since March 1, 1953, would be twenty-one instead of twenty-two.

By Mr. Keenan:

Q. Now, on March 31, 1954, or indeed, at any time during the year 1954, did Gilbertville Trucking Company owe any money to any of its officers or directors?

A. Yes, it did.

Q. During the year 1953, did Gilbertville owe any money to its officers and directors?

A. It did.

[fol. 252] By Mr. Keenan:

Q. The question is: as of December 31, 1953, Mr. Solomon, please advise me how much money Gilbertville owed to its officers and directors?

A. \$11,792.05.

Q. As of March 31, 1954, do you have any information as of that date?

A. March 1, '54?

Q. March 31, is the date I have reference to.

A. I do not have anything here with me that would give me the answer as of March 31 of '54.

Q. All right; November 9, 1954?

A. I can give you the year end.

Q. Do you have anything on November 9, 1954?

A. No, I would not have it.

Q. All right; December 31, 1954?

A. Yes, sir. Notes payable to Kenneth Nelson on December 31, 1954: \$15,024.13.

Q. \$15 thousand—

[fol. 253] A. \$15,024.13.

Q. May 31, 1955, the date dealt with by your Exhibit B-4 in the application in this proceeding.

A. On May 31, 1955, \$14,037.75.

Q. December 31, 1955, the date covered by your Exhibit 5 in this proceeding? That is not with the application.

A. \$15,597.

Q. And, finally, July 31, your Exhibit 6, 1956?

A. Yes, sir. \$20,095.

Q. Now, was all of the \$11,792 you talked of as being owed to officers on December 31, 1953, owed to Kenneth Nelson?

A. It was.

Q. You have already testified that the \$15,024 on December 31, 1954, was owed entirely to Kenneth Nelson, right, sir?

A. That's right, sir.

Q. How about the other three amounts you have given me?

A. Only to Kenneth Nelson.

Q. Now, between December 31, 1953, and July 31, 1956, what is the greatest amount of money at any given time that Kenneth Nelson had loaned to Gilbertville Trucking and which was outstanding?

A. The \$20,095 as of July 31, 1956.

Q. I didn't ask my question clearly, I guess, Mr. Solomon. I am not referring now to the figures you have just given me. I am asking you whether you can tell me how much, [fol. 254] what is the greatest amount at any given time, whether it is the middle of the year, beginning or end, that Kenneth Nelson lent to Gilbertville?

A. From the facts I have with me, I could not give you that; but, I would say approximately: it could not have exceeded this figure of \$20,000.

Q. Now, if I were to suggest to you that on November 9, 1954, Gilbertville Trucking Company owed Kenneth Nelson \$25,000, you would not be in a position to tell me whether it was true or not, is that right?

A. That is correct; I would doubt it.

Miss Kelley: Can I have that question and answer again?

Mr. Keenan: I may be—well, perhaps the reporter will read it.

Exam. Baumgartner: Purely a hypothetical one.

[Question and answer read by the reporter.]

By Mr. Keenan:

Q. Mr. Solomon, do you keep Kenneth Nelson's personal financial records for him?

A. I prepare his tax return, yes, sir.

Q. And do you keep custody of the material which is necessary to provide the information for that tax return? In other words, his records of loans made and debts incurred, that kind of thing?

A. No, it would not be in there, no; just for his income tax: income.

Q. You don't yourself have custody of his records of [fol. 255] debts incurred and loans made?

A. No, I do not.

Q. You are able to obtain the records reflecting the loans made and debts which are due to Gilbertville Trucking?

A. That is correct.

Q. And there is a ledger maintained in the accounts of Gilbertville Trucking Company with Kenneth Nelson, is there not?

A. That is correct.

Q. And running your eye down that ledger you would be able to determine very, very rapidly what is the greatest amount that has ever been outstanding owed to Kenneth Nelson by Gilbertville Trucking, right?

A. That is correct.

Q. And you would be able to give us the date?

A. That's right.

Q. Now, do you know whether any director or officer of Gilbertville Trucking, other than Kenneth Nelson, has lent it money?

A. No other officer has loaned it any money.

Q. Has any other director done so?

A. No, none of them.

Q. Where is the ledger kept which reflects the debts owed by Gilbertville to Kenneth Nelson?

Miss Kelley: I object. The materiality of that and the pettiness of some of this inquiry—

Exam. Baumgartner: Well, I'll tell you, if he does answer [fol. 256] it is a harmless answer, so to save time let's get the answer.

The Witness: At the main—

Miss Kelley: It is such—

The Witness: —offices of the corporation. It is kept in Ellington, Connecticut, as I explained before.

Q. Yes, and in whose custody is it?

A. The bookkeeper of Gilbertville.

Q. What is his name?

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[fol. 259] The Witness: The bookkeeper's name is Mary Kane. However, if you need the general ledger I can get it.

Exam. Baumgartner: That is enough. Just answer the question.

Mr. Keenan: Thank you, sir.

Exam. Baumgartner: We are getting into too many details now without your adding a whole lot more.

The Witness: Yes, sir.

By Mr. Keenan:

Q. Now, Mr. Solomon, since the middle of 1948 have you been personally acquainted with each of Mrs. Linnea Nelson's children?

A. Since, as I testified earlier, January of 1949.

Q. I'm sorry, January of '49?

A. That's right.

Q. You have been thus acquainted, right?

A. Right, sir.

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[fol. 263] Q. Did Oscar Chilberg perform any services for L. Nelson and Sons after May 14, 1948?

Miss Kelley: To what date?

Mr. Keenan: Any date.

The Witness: He sold his stock, as you know, in '51, so naturally he was receiving compensation until '51, at least.

Q. After June 30, 1951, did Mr. Oscar Chilberg perform any services for L. Nelson and Sons?

A. As an employee?

[fol. 264] Q. In any capacity whatsoever?

A. He operates a garage that does repair work for Nelsons.

Q. How much compensation since June 30, 1951, has Oscar Chilberg received from L. Nelson and Sons?

Miss Kelley: I object to the form of that question.

Exam. Baumgartner: For services performed?

Mr. Keenan: Mr. Examiner, how am I to determine whether it is for services performed, or not? I am at the mercy of the witness if I ask it that way. I respectfully

submit this is cross-examination. The witness is then in a position to say he received one dollar for services performed and he received the rest of it as a gift.

Miss Kelley: Mr. Examiner, the witness is trying to answer, and I think everybody in this room is convinced that he is trying to answer these questions honestly. Now, he has said that Oscar Chilberg was connected with a garage. If we go into exact detail there, we have to know all the entire setup about this garage, whether it's an individual or a corporation, or what it is. If there were some services performed, they would have been garage services, a separate corporation. What is the materiality of that in this proceeding?

Exam. Baumgartner: Well, the witness said that he operated a garage, so we assume from that answer that he as an individual operated that garage, and there is nothing to indicate to the contrary; and we must assume, further, that he received some compensation for services performed [fol. 265] in the garage, or by the garage employees, for the Nelson Company. Now, what counsel wants to know is how much he received since—

Mr. Keenan: June 30, 1951, if the Examiner please.

The Witness: I could not give you—he ran a business, and I could not say how much, exactly, repairs he did just for Nelson's.

By Mr. Keenan:

Q. Of course, I didn't want to know how much repairs he did for Nelson. What I wanted to know is how much money Nelson paid him.

A. Yes. I could not.

Q. Could you answer that?

A. No. From his sales record here, which I am taking from his tax return, I could not tell just how much is from Nelson's.

Q. I see. Do you have any records of L. Nelson and Sons which will permit you to determine how much L. Nelson and Sons paid to Oscar Chilberg?

A. I do not have any here with me.

Q. I see there is a ledger account which reflects that information?

A. Accounts payable, that's right.

Q. And that is in the same type of custody we have discussed before with reference to the other ledger account?

A. That's right.

Q. What is the nature of the services rendered by Oscar Chilberg to L. Nelson and Sons? You have told us he ran a garage. What did he use that garage for to benefit L. [fol. 266] Nelson and Sons when he rendered services?

A. Repairs of Nelson's equipment.

Q. Where is the garage situation?

A. In Philadelphia.

Q. And have you any way of telling how many units of Nelson's equipment he serviced a month or a week or a year, on the average?

A. The bills at the office, at Nelson's office, would indicate that.

Q. But, you don't have that information right now?

A. No, I do not.

Q. When did that service of repairing Nelson's equipment, when did that service begin by Oscar Chilberg?

Miss Kelley: I object, Mr. Examiner. There we go again into immaterial facts.

Exam. Baumgartner: I will let the question stand.

The Witness: Business started some time in 1952.

Q. What is the name of the business, please?

A. Lehigh Garage.

Q. L-e-h-i-g-h?

A. That is right, sir.

Q. What is the address?

A. Twenty-six—

Miss Kelley: I object.

Exam. Baumgartner: Well, I think he is entitled to get [fol. 267] the address.

Mr. Keenan: May the witness proceed?

Exam. Baumgartner: Yes, I have already ruled.

Q. Go ahead, Mr. Solomon.

A. 2064 East Lehigh Avenue, Philadelphia, Pennsylvania.

Q. That it: two-o-sixty-four?

A. That's right.

Q. Have you any means of accurately determining how much of the gross revenue of Lehigh Garage was derived from L. Nelson and Sons?

Miss Kelley: I object.

Exam. Baumgartner: He answered that question in the negative a while ago.

The Witness: That's right, sir.

Q. And, finally, is L. Nelson and Sons still doing business with the Lehigh Garage?

Miss Kelley: I object.

Exam. Baumgartner: I will permit the question to stand.

Q. Will you answer, sir?

A. He is—he owns the—

Exam. Baumgartner: The question is: do you know.

The Witness: If he is doing—

Exam. Baumgartner: Is he still doing business—

The Witness: In a category, yes.

Q. What do you mean by: in the category?

[fol. 268] Exam. Baumgartner: No, the question—

The Witness: Yes.

Exam. Baumgartner: —whether Oscar Nelson as owner and operator of this garage is still doing business with L. Nelson and Sons Company, is that right?

Mr. Keenan: Well, not quite, sir. What I meant to find out, first of all, is whether the garage is still doing business with L. Nelson and then whether Oscar owned the garage?

The Witness: It is still doing business with Nelson.

Q. What is Oscar's present relationship with the garage?

A. He still owns the garage.

Q. Is he the sole owner of it?

A. That is right, sir.

Q. Beyond the services rendered to L. Nelson and Company by the Lehigh Garage, has Oscar Chilberg rendered any services to L. Nelson and Company since June 30, 1951?

Miss Kelley: That is repetitious. I object. It's a repetitious question.

Mr. Keenan: I claim it.

Exam. Baumgartner: No, I don't think it is quite repetitious.

Q. Do you have the question in mind?

A. No, I don't. Would you want to restate it?

Q. Since June 30, 1951, other than the services rendered [fol. 269] to L. Nelson and Company by the Lehigh Garage, has Oscar Chilberg rendered any services to L. Nelson and Company?

A. No other services, no.

Q. Has he received compensation from L. Nelson and Company other than the compensation received by the Lehigh Garage?

A. He has not received any compensation.

Q. And I am speaking, of course—

A. From Nelson's.

Q. —between the date: June 30, 1951, and the present.

A. No, sir.

Q. Now, Mr. Solomon, at any time subsequent to September 22, 1951, has Kenneth Nelson rendered any services to L. Nelson and Sons?

A. Since '51?

Q. Since September 22, 1951?

A. Yes, he has.

Q. Would you proceed as you were going to, to tell me what those services are?

A. As a free-lance tariff consultant.

Mr. Barrett: I didn't hear, Mr. Solomon.

The Witness: Free-lance tariff consultant.

Miss Kelley: Mr. Examiner, I submit this was all gone into this morning.

The Witness: You mentioned—

Mr. Keenan: I agree that is repetitious. My next question [fol. 270] won't be:

Q. What is a free-lance tariff consultant?

A. An independent, just the same as myself, someone who holds himself out to do a certain classified work for someone else.

Q. I understand, I think, Mr. Solomon, the type of work

you do. Will you tell me what type of work a tariff consultant does?

Miss Kelley: I object.

Exam. Baumgartner: Well, answer it if you know.

The Witness: I am not qualified to answer what a tariff consultant does.

Q. Who was responsible in the management of L. Nelson and Sons for making the decision to hire Kenneth Nelson as a free-lance tariff consultant?

A. That would be under Charles Chilberg and other stockholders there.

Q. I see. Did Charles Chilberg ever seek your advice on this particular management decision?

A. No, sir.

Q. And did Charles Chilberg ever advise you as to his reasons for making this management decision?

Miss Kelley: I object.

Mr. Keenan: I think the witness' answer is going to be no, so why don't you let him answer?

Exam. Baumgartner: Did he?

[fol. 271] Miss Kelley: Are we going to keep this up for weeks?

The Witness: Would you restate it, please?

By Mr. Keenan:

Q. Did Charles Chilberg ever state to you his reasons for making this management decision?

A. No, he did not.

Q. And is Charles Chilberg in the room now?

A. Yes, he is.

Q. Now, how much compensation has Kenneth Nelson received from L. Nelson and Sons since September 22, 1951?

Miss Kelley: I object unless the question is tied down to a particular period.

Mr. Keenan: The period I refer to is from September 22, 1951, until the present date. The examiner will possibly recall that September 22, 1951, is the date when Kenneth Nelson purported, according to the witness, to resign as officer and director.

Miss Kelley: I object to the phraseology used by Mr. Keenan.

Exam. Baumgartner: What part of it?

Miss Kelley: Well, his sarcasm is wholly unnecessary.

Mr. Keenan: Well, if the Examiner please, I am hardly going to admit that he resigned at this stage of the game.

Exam. Baumgartner: What is the question, Miss Reporter?

[The question was read by the reporter as follows: "Now, how much compensation has Kenneth Nelson received from [fol. 272] L. Nelson and Sons since September 22, 1951?"]

Exam. Baumgartner: Do you know the answer to that question, Mr. Witness?

The Witness: It appears from his tax return there was one year here, there was one year, in 1952, that he did receive compensation.

By Mr. Keenan:

Q. There was one year here, in 1952, when he did receive compensation. How much compensation did he receive from L. Nelson and Sons?

A. \$15,650.

Exam. Baumgartner: From L. Nelson and Company?

The Witness: That's right, sir.

Exam. Baumgartner: During the year 1952?

The Witness: 1952.

By Mr. Keenan:

Q. Mr. Solomon, is there any coincidence between the fact that he received that compensation and the fact that his average loan to Gilbertville Trucking Company between '53 and '56 has been about \$15,000?

A. There would be no coincidence. If you recall, as of March 1, 1953, the corporation owed Kenneth Nelson approximately \$11,000.

Q. As of March 1, '53, who owed Kenneth Nelson \$11,000—oh, I see, you're talking about Gilbertville?

A. I testified earlier to that figure.

Q. You are correct, sir. I do recall that. Now, did you

[fol. 273] exhaust your knowledge concerning Kenneth Nelson's services to L. Nelson and Sons when you told us that he served as a tariff consultant? In other words, did he do anything else besides serving as a tariff consultant between September 22, 1951, and the present date for L. Nelson and Sons? Is the question clear?

A. Yes, it is.

Q. Will you answer it?

A. I believe only as tariff consultant.

Q. You believe—are you in some doubt about that?

Miss Kelley: I object to the witness being hounded. He further, I believe, tied his answer down previously to the year 1952.

The Witness: That's right.

Miss Kelley: And it is repetitions.

Exam. Baumgartner: That was a matter of compensation tied down to '52, but not performance of services.

Q. Are you sure, or is there some doubt about it?

A. Would you mind restating the question?

Exam. Baumgartner: If you don't know, Mr. Witness, say so.

The Witness: Yes.

Exam. Baumgartner: It is easy to say you don't know, if you don't.

Q. All I am seeking to do is find out with accuracy what the state of your knowledge is, Mr. Solomon.

A. Would you mind restating your question?

[fol. 274] Q. Did Kenneth Nelson provide anything but tariff consultant's services to L. Nelson and Sons between September 22, 1951, and the present date?

A. I would not know.

Q. By that do you mean you don't think he did, or you don't know whether he did?

A. I don't know whether he did.

Q. It is therefore possible that he did provide services—

Miss Kelley: I object to the characterization.

Exam. Baumgartner: I think that it is a little bit argumentative, Mr. Keenan.

Mr. Keenan: I only want to make sure—

Exam. Baumgartner: It is just an argumentative question now. Why don't you go on with your examination.

Mr. Keenan: I didn't want to argue. I just want to make sure I understand the witness.

Exam. Baumgartner: It started out to be an argumentative question.

By Mr. Keenan:

Q. Now, you have told us that Kenneth Nelson received some money from L. Nelson and Sons during the year 1952. Do you know what, if any, amounts of money Kenneth Nelson received from L. Nelson and Sons between September 22, 1951, and December 31, 1951?

Exam. Baumgartner: Do you know the answer to that?

The Witness: I don't offhand, unless I looked at his tax [fol. 275] return here.

Mr. Keenan: The witness has to refer to his records.

Miss Kelley: Wouldn't you be able to tell a particular period of time?

Mr. Keenan: Objection to counsel asking a question on redirect during cross.

Exam. Baumgartner: Reserve your question for rebuttal.

Miss Kelley: It's only for clarification. We all know an income tax covers a whole year. He is asking for a portion of a year. It's obvious—

Exam. Baumgartner: The witness can take care of himself.

Miss Kelley: I know he can.

Mr. Keenan: I agree, Mr. Examiner.

Miss Kelley: You recall Mr. Keenan said this morning he had one more hour. We have had three or four hours of this—

Mr. Keenan: We might have even more at the rate we are going.

Miss Kelley: I am not going to work nights if this is the type of thing we are going to have all day long.

Mr. Keenan: Well, if the Examiner please, I will be more than happy to assent to any motion Miss Kelley cares to make to withdraw the application in this proceeding.

Exam. Baumgartner: I think that is a bit of sarcasm, and I don't think Miss Kelley's sarcasm is in order, either. I think both counsel should be a little bit more courteous, one to the other.

Mr. Keenan: I apologize, Mr. Examiner, and I will attempt to be guided by your suggestion.

[fol. 276] By Mr. Keenan:

Q. My question was, sir: do you know what, if any, compensation Kenneth Nelson received from L. Nelson and Sons between September 22, 1951, and December 31, 1951?

A. I wouldn't know unless I looked at my tax return.

Q. Will you please do so?

Exam. Baumgartner: How can you ascertain from the tax return?

The Witness: I can't tell between a period.

Exam. Baumgartner: The answer is you don't know?

The Witness: I don't know.

Q. Mr. Solomon, again, that information is available from the ledgers we have been talking about?

A. Right; yes, sir.

Q. What, if any, compensation did Kenneth Nelson receive from L. Nelson and Sons between January 31, 1953, and the present date?

Exam. Baumgartner: I think the witness answered that question once.

Miss Kelley: I think he did, too.

Exam. Baumgartner: He said he received \$15,000, some-odd, in the year 1952.

Mr. Keenan: I didn't understand the witness as being exhausted. If he was, then that is the end of it.

Exam. Baumgartner: That was my understanding, that that was the sum total of what he received during that period.

[fol. 277] Isn't that what you said, Mr. Witness?

The Witness: Well, I said it was, as far as 1952. I mean, I mentioned the year.

Exam. Baumgartner: Did he receive any more?

The Witness: In 1953, yes, sir.

Exam. Baumgartner: Well, answer the question, then.

By Mr. Keenan:

Q. Will you tell us how much?

Exam. Baumgartner: How much did he receive in 1953 from L. Nelson and Sons? If you can tell from your records. I don't want you guessing or speculating.

The Witness: \$13,829.09.

Q. And, finally, 1954?

A. None.

Q. 1955?

A. None.

Q. In so far as you have current data?

A. None.

Mr. Barrett: Mr. Examiner, may I butt in here so I won't lose sight of it. There was a question I was going to ask. In 1953, what period does that \$13,000 cover? For the entire year?

The Witness: That is for the entire year. I wouldn't know for what period, now.

Mr. Barrett: Thank you.

By Mr. Keenan:

Q. Charles Chilberg is still a stockholder and director [fol. 278] of L. Nelson and Sons?

A. That is correct, sir.

Q. Clifford Nelson is in the same status?

A. That is right, sir.

Q. In what capacity was Howard Chilberg originally employed by L. Nelson and Sons?

Miss Kelley: I object. I believe that is in the record at least three times, Mr. Examiner.

Mr. Keenan: If I recall, the Examiner, as a matter of fact, advised me to determine that information at one stage of the proceeding, and I promised to try to do so.

Exam. Baumgartner: What is the question, Miss Reporter? Part of it was blanked out on me.

[The question was read by the reporter as follows: "In what capacity was Howard Chilberg originally employed by L. Nelson and Sons?"]

Mr. Keenan: If the Examiner will recall, Howard Chilberg is that member of the family concerning whom I was mistaken. I called him a director and Miss Kelley picked me up on it and said he was an employee, and the Examiner stated at that time: "Do you want to find out what the nature of his employment was."

Exam. Baumgartner: You may answer the question.

The Witness: Howard Chilberg?

Exam. Baumgartner: Yes.

The Witness: Yes, he was office manager.

[fol. 279] Q. And did he remain office manager until—well, when did he stop being office manager?—is a short way to handle this.

A. Yes. On October 15, 1951.

Q. And thereafter, in other words, after October 15, 1951, did he perform any services for L. Nelson and Sons?

A. No, he did not.

Q. After October 15, 1951, did he receive any compensation from L. Nelson and Sons?

A. No, he would not.

Q. You say he would not. Do you know as a fact he did not?

A. He is a civilian employee with the Navy. He returned to his old job, and he would not.

Exam. Baumgartner: The question is: did he receive any compensation?

The Witness: He did not.

Exam. Baumgartner: That is all.

Q. At any time has Mrs. Nyberg rendered services to L. Nelson and Sons?

A. No, she never has.

Q. At any time has she received compensation from L. Nelson and Sons, other than dividends owed her as a stockholder?

A. No, she has never received.

Q. Are the same facts true of Rita Carlson?

A. No, they are not. In other words Greta Carlson did render services there for various periods.

[fol. 280] Q. Well, did she render any services to L. Nelson and Sons during the year 1953? I am interested in the period: '53 until the present, Mr. Solomon, because it is in March of '53 that Kenneth Nelson acquired Gilbertville.

A. The last year that she rendered any services to Nelson is in '53, sir.

Q. When did she begin thus to render services in '53, and when did she stop?

A. I couldn't give the exact dates. I'm taking it from her tax return.

Q. What was the nature of the services rendered?

A. Yes. She's an office clerk.

Q. What is the total amount of compensation she received for such services?

A. In 1953: \$1,550.

Q. After 1953, did she render any services to L. Nelson and Sons?

A. None whatever.

Q. And she therefore also received no compensation from L. Nelson, right?

A. That's right.

Q. You understood me to be referring to Greta Carlson, did you not?

A. Yes.

Q. Even though I mispronounced her name and called her Rita.

[fol. 281] Q. Phyllis Nelson: has she ever rendered any services to L. Nelson and Sons?

A. None; none whatsoever.

Q. Has she ever received any compensation?

A. None.

Q. Mr. Kashady—what is his first name?

A. John.

Q. John Kashady—

Miss Kelley: I object, Mr. Examiner. This is definitely not in connection with the finance proceeding.

Mr. Keenan: If the Examiner will recall, we ran down a roster of people and have accurately determined who

has and who has not got a stock interest in L. Nelson and Sons, and who has and who hasn't got a stock interest in Gilbertville.

Miss Kelley: What is the materiality in a finance case as to whether the stockholders of Gilbertville ever rendered any services for Nelson?

Exam. Baumgartner: I will permit the question to stand.

Q. The question is, Mr. Solomon, has Mr. Kashady ever rendered any services to L. Nelson and Sons?

A. I wouldn't know that.

Q. When you say you would not know that, do you mean you do not know that?

A. I do not know that.

Q. Has he received compensation from Nelson?

[fol. 282] A. He has not.

Q. From L. Nelson—

A. Ever since Gilbertville started. I don't know if he ever was an employee before of Nelson's; if he ever at any time was in the employ of Nelson's, I do not know.

Q. But you are sure he was not employed by L. Nelson and Sons after March 1, 1953?

A. That, I am positive of that.

Q. Why are you positive of that, whereas you are not sure whether he was such an employee during February of 1953?

A. I mean—I mean, I would definitely know where the man was working, who he was working for.

Q. I guess maybe I had better ask you what the source of your information is concerning Mr. Kashady's employment status?

A. Only from my personal knowledge now I am giving it to you.

Q. How did you acquire that knowledge?

A. Just by observation.

Q. You didn't see him around L. Nelson's place, is that right?

A. No, I wouldn't know him, I believe.

Q. I still didn't hear that answer?

A. I would not know him. I mean, I was never properly introduced to the man, and the people who do visit Nelson's I do know.

Q. Well, let's see if I understand, what you are saying correctly is: you were never introduced to the man prior to [fol. 283] a given date, is that right?

A. That's right, sir.

Q. When did you first meet him?

A. I met him at Kenneth Nelson's house one day.

Q. Approximately when, as best you can fix it—approximately?

A. In 1954.

Q. Early, late, or in the middle?

Miss Kelley: Oh, I object, Mr. Examiner.

The Witness: I have a few hundred accounts; and, boy, this is pretty hard.

Q. If you can't answer, by all means say so.

Miss Kelley: I object to the question.

Exam. Baumgartner: Mr. Witness, I think you would save your self a lot of trouble if you do just say: I don't know.

The Witness: I don't know.

Exam. Baumgartner: When you don't know, say you don't know, and you will save yourself so much anxiety and trouble.

The Witness: I don't know.

Mr. Keenan: I agree, Mr. Examiner.

By Mr. Keenan:

Q. You don't know when you met him. You just know you met him some time in 1954?

A. That's right, sir, '53 or '54.

Q. Now, let us see. You have told me, if I recall correctly, that he has rendered no services to L. Nelson and Sons from 1953 on, right, so far as you know?

[fol. 284] A. That's right.

Q. Do you know whether he has received any compensation from L. Nelson and Sons from 1953 on?

A. I would know that answer: that he did not receive any compensation.

Q. Mr. Solomon, perhaps we can shorten this examination if I tell you I have difficulty when you use the words: "I

would know," or "I would not know," because it leaves room for doubt as to what you mean. If you would say: "I do know," or "I don't know," why, then, I don't have to ask you any more questions about it.

Now my question is: do you know whether he received any compensation from L. Nelson and Sons from January 1953 until the present date?

A. I would not know that. The reason is—

Exam. Baumgartner: Mr. Witness, let me explain—

Miss Kelley: He says: I do not know.

Exam. Baumgartner: —that word "would" you are using is a colloquial expression, and people fall into the habit of saying "I would not know" when they really should say, "I do not know." That is what he is getting at, and that is what I am getting at.

Q. I guess what you mean when you say "I would not know," is that you are not in a position to know?

A. That is correct.

Q. I inferred that you meant that, but I still want to know exactly what the state of your knowledge is, regardless of [fol. 285] how readily you can inquire. Do you know whether or not Kashady received any compensation from L. Nelson and Sons from January 1953 until the present date, please?

A. I do not know.

Q. Paroshinsky: the same questions with regard to the same periods?

A. I do not—I change that. Mr. Paroshinsky never has received any compensation other than for legal services that he does render.

Exam. Baumgartner: To whom?

The Witness: Mr. Paroshinsky is an attorney for Gilbertville.

Q. Right, sir; if we can go back over this just a little bit: Has he ever rendered any service of any nature to L. Nelson Sons from January 1953 until the present date?

A. He never has.

Q. Has he received any compensation from L. Nelson Sons from January 1953 until the present date?

A. He never has.

Q. Now—

Exam. Baumgartner: Mr. Keenan, would it inconvenience you if we took a five-minute recess?

Mr. Keenan: No, sir.

Exam. Baumgartner: All right, we will take a five-minute recess.

[fol. 286] [A five-minute recess was taken.]

Exam. Baumgartner: Ladies and gentlemen, we will please come to order. Mr. Keenan, will you please proceed.

Mr. Keenan: Yes, sir. Thank you.

By Mr. Keenan:

Q. Mr. Solomon, subsequent to June 30, 1951, did Oscar Chilberg render any services to Gilbertville Trucking Company, Inc.?

Miss Kelley: June 30, 1951?

Mr. Keenan: That's right. If I recall correctly, that is the date on which Oscar Chilberg transferred his fifty shares of stock of L. Nelson and Sons?

Miss Kelley: I object, Mr. Examiner. I believe it is very clear in the record that Kenneth Nelson had no connection with Gilbertville Trucking Company until March of 1953.

Exam. Baumgartner: Well, he may answer.

Miss Kelley: I submit, Mr. Solomon has had a difficult day, and with figures thrown that way, I believe they are set deliberately in an effort to confuse the witness, and I don't think it is a fair question when it is clear on the record.

Mr. Keenan: I have more confidence in the witness than counsel does. He doesn't look confused to me.

Miss Kelley: If you had been questioned all day, I believe you would be pretty tired.

Exam. Baumgartner: Let's proceed.

By Mr. Keenan:

Q. The question is, Mr. Solomon: subsequent to June 30, [fol. 287] 1951, did Oscar Chilberg, so far as your records will permit you to determine, render any services to Gilbertville Trucking Company?

A. He has not rendered any services to Gilbertville Trucking Company.

Q. Just to be abundantly clear about that, it therefore follows that the Lehigh Garage has rendered no services to Gilbertville Trucking Company, right?

A. That would be correct, yes; Lehigh Garage would not perform any services for Gilbertville. It is located in Philadelphia.

Q. Yes, the Lehigh Garage has not performed any services for Gilbertville, right?

A. That is correct.

Q. Now, at any time subsequent to March 1, 1953, has Charles Chilberg rendered any services—no, withdraw that question.

A. At any time subsequent to June 30, 1951, has Oscar Chilberg received any compensation from Gilbertville Trucking Company, Inc.?

Q. That is the other half of the coin that I neglected to inquire about.

A. He has not received any compensation from Gilbertville.

Q. At any time subsequent to March 1, 1953, has Charles Chilberg rendered any services to Gilbertville Trucking Company?

A. No, he never has.

Q. Any compensation received from Gilbertville Truck- [fol. 288] ing Company?

A. To my knowledge Charles Chilberg has never received any compensation from Gilbertville.

Q. At any time subsequent to March 1, 1953, has Clifford Nelson rendered any services to Gilbertville Trucking Company?

A. He never has.

Q. Compensation received?

A. He never has received any compensation from Gilbertville.

Q. Has Howard Chilberg, since March 1, 1953, rendered any services to Gilbertville Trucking or received compensation therefrom?

A. He has not received any compensation from Gilbertville Trucking Company. Did you say Oscar Herbert?

Q. No, I said Howard.

A. Howard: none at all.

Exam. Baumgartner: The answer is no to both questions?

The Witness: That's right.

Q. Now, is the answer no to both questions with respect to Mrs. Nyberg and Greta Carlson?

A. That is correct, sir.

Q. Has Phyllis Nelson ever rendered services to Gilbertville?

A. No, she hasn't.

Q. Just so I get this picture straight: Oscar, Charles, Kenneth, Clifford, Howard, and Ruth are all children of Mrs. Linnea Nelson, right?

[fol. 289] A. Yes. Did you mention seven names there?

Q. I mentioned six names. I should have added Rita.

A. That's right, sir.

Q. Or Greta; and, of course, Phyllis is a daughter-in-law of Mrs. Linnea Nelson?

A. Yes, sir.

Q. So that the only people we have been discussing so far who are not related to Mrs. Linnea Nelson are Kashady and Paroshinsky, right?

A. That is right, sir.

Q. Now, Mr. Solomon, part of the information concerning the prices at which these Nelson and Sons shares were transferred is in the record. However, it is in the record in such fashion that my notes don't reflect it clearly. I should like very rapidly to invite your attention to the dates of the transfer and ask you to give me the price of the transfer and the transferor and transferee?

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[fol. 291] Miss Kelley: It was a hundred dollars per share for the original shares that Kenneth Nelson and Oscar Chilberg owned; and then the appraised price, Mr. Solomon, will you confirm it, wasn't that practically a hundred dollars, a few dollars less?

The Witness: Eighty-two dollars and fifty-two cents per share.

By Mr. Keenan:

Q. Then, just to button the thing up, on June 30, '51, when Oscar sold his stock, he sold it at a hundred dollars a share, right?

A. That is right.

Q. And when Kenneth sold his on September 22, 1951, he sold it at a hundred dollars a share? And on January 24, 1953, when stock was distributed from the estate to each of the seven children, it was distributed at the value of—

A. Eighty-two dollars and fifty cents, times forty-two—in other words, \$3,465—

[fol. 292] Miss Kelley: That's it.

The Witness: —to Kenneth Nelson.

Q. Now, at some time prior to the distribution of the stock from the estate to the legatees, which took place January 24, 1953, you testified on direct that Oscar and Kenneth, quote, had arranged, unquote, to sell to somebody else the shares they were due to receive from the estate. Do I recall your testimony correct? Would you like the reporter to read that?

A. When did that happen, yesterday?

Exam. Baumgartner: He is asking if you would like to have the question read back to you.

Mr. Keenan: I think he has it in mind.

The Witness: I have the question in mind, but I think his type of question is that of some question yesterday.

Exam. Baumgartner: Oh, yes, I think it was gone into yesterday.

Q. Do I restate it accurately, Mr. Solomon, or would you like to change it?

A. Restate it again, please?

Exam. Baumgartner: Read the question, Miss Reporter.

[The question was read by the reporter as follows: "Now, at some time prior to the distribution of the stock from the estate to the legatees, which took place January 24, 1953, you testified on direct that Oscar and Kenneth, quote, had arranged, unquote, to sell to somebody else the shares they

[fol. 293] were due to receive from the estate. Do I recall your testimony correctly?"]

The Witness: That is correct.

Q. What did you mean by "had arranged"? In other words, will you tell me what events transpired as a result of which that arrangement came into being?

A. Yes. When the stock would be transferred from the estate to the individual heir, the heir would then sell it.

Q. My question was: will you tell me what events transpired as the result of which that arrangement came into being.

Miss Kelley: He has just answered the question. It is the same one.

Exam. Baumgartner: He is not asking about the agreement. He is asking what was done pursuant to these arrangements. As a result of these arrangements what happened?

Mr. Keenan: No, sir. What I wanted to know was what events constituted the arrangement that the witness is talking about. Who said what to whom?

Miss Kelley: Oh, that was—

Mr. Keenan: He says there's an arrangement and I don't know what it is.

Exam. Baumgartner: Do you know what was said?

The Witness: No, I don't know what was said.

Exam. Baumgartner: Do you know the details of the arrangement?

[fol. 294] The Witness: When a person sold his original fifty shares, Mr. Examiner, it was then agreed that when the person would receive any from the estate, he would then sell the shares he received from the estate.

Exam. Baumgartner: I know, but counsel is asking for more than that. He wants to know what was said, how the arrangement came about?

The Witness: I do not know.

Exam. Baumgartner: How it was accomplished?

The Witness: I do not know.

Mr. Keenan: I think I can shorten this up.

Q. What is the source of your information concerning this arrangement? How did you find out about the arrangement, Mr. Solomon?

A. I was told.

Q. Who told you?

A. I do not know who told me.

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[fol. 295] By Mr. Keenan:

Q. Now, my notes also reflect like testimony by you, Mr. Solomon, concerning a, quote, arrangement, unquote, that Howard Chilberg made for such a transfer of his inherited shares. Is your testimony the same about those?

A. I believe I never said that about Howard Chilberg.

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[fol. 296] Q. If you ever did testify that Howard Chilberg had entered into such an arrangement, you desire to correct such testimony now, is that right?

A. I would desire to correct it, if I ever did.

Q. If you had made it?

A. Yes.

Q. Now, when the application in this proceeding was filed in August of 1955, Greta Carlson had forty-two shares of the stock of L. Nelson, right?

A. Correct.

Q. To that extent, Exhibit A attached to the application, constitutes a misrepresentation, correct?

Miss Kelley: I object.

Mr. Keenan: Excuse me. I withdraw that remark.

Q. To that extent, Exhibit A attached to the application is incomplete, is that correct?

Miss Kelley: I'm sorry.

[fol. 297] Q. In other words, Exhibit A, Paragraph 4, does not set forth the name and business address of the ten principal stockholders of L. Nelson, does it?

Miss Kelley: Mr. Examiner, may I agree that it does not, and that that is an error on my part in failing to have it recorded.

Exam. Baumgartner: In what respect is it deficient?

Miss Kelley: Simply that on Page 5 of the application, Mr. Examiner, it asks for the ten principal stockholders, and I listed the names of Charles Chilberg and Clifford J. L. Nelson and neglected to show the third stockholder, Greta Carlson, who owns forty-two shares.

Exam. Baumgartner: Is that the only deficiency?

Miss Kelley: That is the only deficiency.

Exam. Baumgartner: Does that satisfy you?

Mr. Keenan: It does. I understand counsel stipulates the deficiency. I don't need to ask the witness about it.

Exam. Baumgartner: You desire that the application be amended, Miss Kelley?

Miss Kelley: Yes, I would appreciate it if it could be amended in that respect.

Mr. Barrett: No objections.

Exam. Baumgartner: Then we will regard the application as amended, to show how many shares to—

Miss Kelley: Forty-two shares. It is the inheritance [fol. 98] that Greta Carlson received.

Exam. Baumgartner: Greta Carlson?

Miss Kelley: From her mother's estate.

Exam. Baumgartner: Greta Carlson, forty-two shares, Page 5.

Miss Kelley: Mr. Examiner, one other point. Of course, I failed to also show there the six shares held by The L. Nelson and Sons—

Exam. Baumgartner: Well, it says the ten principal stockholders. I would worry about the six shares.

By Mr. Keenan:

Q. Now Exhibit A-5 attached to the application reflects notes payable to officers amounting to some \$9,700. To whom is that owed?

A. Clifford Nelson and Charles Chilberg.

Miss Kelley: Mr. Examiner, for identification can we have the record show that Exhibit A-5 is the balance sheet statement of The L. Nelson and Sons Transportation Company as of May 31, 1957?

Exam. Baumgartner: Exhibit A-5 to the application?

Miss Kelley: Yes.

Mr. Keenan: Counsel is correct, Mr. Examiner.

Miss Kelley: Just for clarity, so that it will show in the record.

Q. Now, at any time subsequent to June 30, 1951, was L. Nelson and Sons in debt to any extent to Oscar Chilberg?

A. Subsequent to—did you give the date of the sale of [fol. 299] the stock? Is that what you did?

Q. Yes, I did, sir.

A. In debt to him.

Q. Did he loan it any money?

A. Monies he had loaned it prior to the sale of his stock, they owed him money for.

Q. I see. On June 30, 1951, how much money did L. Nelson owe Oscar Chilberg?

A. I do not have the records here with me, but I could always get them.

Q. Again, a ledger account with L. Nelson and Sons would reflect that information, would it not?

A. Correct.

Q. Now, you have told us where those ledger accounts are kept for Gilbertville Trucking and in whose custody they are, and I should appreciate the same information with respect to the like ledgers reflecting the financial accounts of L. Nelson and Sons.

Miss Kelley: Mr. Examiner, to save a lot of confusion, I wonder if we couldn't ask if Mr. Solomon has knowledge or request Mr. Keenan to ask if Mr. Solomon has knowledge if any sums then owed Oscar Chilberg were paid and if he knows when they were paid. It seems it would simplify his question.

Mr. Keenan: I have no objection to asking that question—

Exam. Baumgartner: Will you please put that question. [fol. 300] Mr. Keenan: I will, Mr. Examiner, but may my pending question be answered, though?

Miss Kelley: I object to the pending question.

Exam. Baumgartner: He may answer it.

Q. Will you answer, sir?

Exam. Baumgartner: Who has custody of the ledger and where is it kept?

The Witness: The bookkeeper of Nelson.

Exam. Baumgartner: Name?

The Witness: Name: Dorothy Darcy.

Exam. Baumgartner: Where is it kept?

The Witness: It is at the main office at Ellington, Connecticut.

Q. Same address as the Gilbertville books, right?

A. Right, sir.

Q. Now the question the Examiner wanted you to answer, and counsel for the applicant, was: have all debts which L. Nelson and Sons owed to Oscar Chilberg been repaid; and, if so, when?

A. Have been repaid?

Q. Yes.

A. From the information I have on here, there was nothing due to Oscar Herbert Chilberg as of December 31, 1953.

Q. What is the source of your information?

A. I am taking it right from an annual report I prepared.

Q. Annual report concerning the financial affairs of whom?

[fol. 301] A. Of Nelson, I am talking about.

Exam. Baumgartner: Annual report to whom; Interstate Commerce Commission?

The Witness: Oh, no. I'm sorry. It is to the directors of the Nelson Corporation.

Q. Oh, you have a report as of December 31, 1953, which indicates what, if any, members of Linnea Nelson's family had loaned money outstanding to L. Nelson and Sons, do you?

A. That is right.

Q. Will you tell me who owed what to L. Nelson and Sons from Linnea Nelson's family on December 31, 1953? That will shortcut a fair amount of questioning.

Exam. Baumgartner: Can you answer, Mr. Witness, whether the Nelson Company owed any monies to any member of Mrs. Linnea Nelson's family as of that date? If the Nelson Company did owe any one of them, or more, how much did it owe them? Can you answer that question?

The Witness: I can answer that, Mr. Examiner.

Exam. Baumgartner: Did you say you can?

The Witness: I can.

Exam. Baumgartner: You can?

The Witness: Yes, sir.

Exam. Baumgartner: Will you please do it as briefly as you can.

The Witness: The sum due by the Nelson Corporation to [fol. 302] Charles Chilberg as of December 31, 1953, \$10,279.92; sum due to Clifford Nelson, \$6,340.22.

Mr. Barrett: I don't like to interrupt, but I missed that one, Mr. Solomon, the last figure.

The Witness: Clifford Nelson, \$6,340.22; Greta Nelson—name now is Greta Nelson Carlson—\$5,032.77; sum due to Kenneth Nelson, \$3,401.24; Ruth Nyberg, \$3,562.67; and Gustave Nelson—that's the father—\$3,210.28.

By Mr. Keenan:

Q. Have you a similar compilation for the year 1954?

Miss Kelley: Mr. Examiner, before we depart from that, just for clarity in the record, can we have Mr. Solomon asked if he knows the basis of these amounts?

Exam. Baumgartner: I have the same question in my mind. Do you mind if I ask it?

Mr. Keenan: Not a bit, sir. I would appreciate it.

Exam. Baumgartner: What was the basis for the indebtedness of the company with respect to each one of these persons or creditors whom you have named?

The Witness: What basis do I have.

Exam. Baumgartner: No. Out of what did this obligation or indebtedness arise, this indebtedness to each one of these persons whom you have named? Did it arise from a loan or from some other sort of transaction?

The Witness: It is a combination of a loan and services [fol. 303] that these persons have rendered to the corporation when they were employed by the corporation.

By Mr. Keenan:

Q. Well, in other words, it represents both money which it paid the corporation in return for the corporation's notes, and also accrued wages?

A. Accrued wages, yes.

Q. Accrued wages only, or were there notes in the picture, too?

A. There were notes in the picture, yes.

Q. Got any breakdown as to how much was owed each of these people by way of accrued wages?

A. Oh, no, I could not tell you that.

Mr. Keenan: Is the Examiner satisfied?

Exam. Baumgartner: I am satisfied, yes.

Q. Have you a similar compilation for the year 1954?

A. I have.

Q. Will you give us the same figures?

A. As of December 31, 1954, the sum due by Nelson to Charles Chilberg: \$660.35; sum due to Clifford Nelson: \$2,217.78; sum due to Greta Carlson—Greta Nelson Carlson—\$4,801.73; sum due to Ruth Nyberg: \$3,562.67.

Q. On December 31, 1954, was anything owed to Kenneth Nelson?

A. Nothing owed to Kenneth Nelson.

Q. How about Gustave?

A. Nothing owed to Gustave.

Q. Finally, have you any information for the period [fol. 304] which has elapsed between December 31, 1954—withdraw that remark.

Have you the same information for December 31, 1955?

The Witness: The figure I have for December 31, 1955, is a consolidated figure, Mr. Keenan.

Q. Yes, sir?

A. It is not broken down to the individual, but I do know it is merely for the two stockholders, due to the two stockholders, how much to each one.

Q. To Charles Chilberg and to Cliff Nelson?

A. That's right, sir, no one else.

Q. Will you tell us what the figure is?

A. \$16,297.98 is the sum due as of December 31, 1955, to Charles Chilberg and Clifford Nelson.

Q. Of course on March 1, 1953; when Kenneth Nelson bought 100 shares of Gilbertville, no application was filed with the Commission for the Commission's approval of that transaction, was there?

Miss Kelley: I object. I don't know whether that is anything that Mr. Solomon can have knowledge of.

[fol. 306] Exam. Baumgartner: Is there anything in the Act which requires that a non-motor carrier who acquires control of a motor carrier file an application for approval?

Mr. Keenan: No, sir.

Exam. Baumgartner: There is not?

Mr. Keenan: No, sir. The question is addressed only to the contention that at the time Kenneth Nelson acquired the stock of Gilbertville Trucking Company, within the meaning of Section 5(6) of the Act, he was affiliated with L. Nelson and Sons.

Exam. Baumgartner: Have you proved that?

Mr. Keenan: No, sir.

Exam. Baumgartner: Then I can't permit the question to be answered. That is an additional reason.

[fol. 311] By Mr. Keenan:

Q. Mr. Solomon, after January 5, 1950 will you give me the name of the person who was the Chief Executive Officer of L. Nelson & Sons Transportation Company?

A. Charles Chilberg.

Q. And has he remained Chief Executive Officer of L. Nelson & Sons Transportation Company ever since?

A. He has.

Q. At any time did Kenneth Nelson serve as Chief Executive Officer of L. Nelson & Sons to your knowledge?

A. Prior to the sale of the stock he was Assistant Treasurer.

Q. Oh, I see. Where are the files kept reflecting the results of traffic solicitations made by L. Nelson & Sons?

Miss Kelley: I object. That's repetitious.

By Mr. Keenan:

Q. Let me simply ask you, are the files kept, the salesmen's files for Nelson & Sons, kept at Ellington, Connecticut?

Miss Kelley: I object to the question because it does [fol. 312] not involve the finance case. Mr. Solomon is not a file clerk to know some of these matters. It's beyond the scope of direct examination.

Exam. Baumgartner: I think he may answer, Miss Kelley.

The Witness: Wherever the files are, they are kept, if they are, in Ellington.

Exam. Baumgartner: You were asked a question where are they kept, that's all.

By Mr. Keenan:

Q. Are they kept at Ellington, the salesmen's files?

A. I don't know.

Q. And if I asked you the same question with regard to Gilbertville Trucking?

A. I do not know.

Q. Please tell me when the first conference occurred at which you were present when the topic of a purchase of Gilbertville Trucking by L. Nelson came up for discussion.

A. I believe I testified January of 1953.

Q. Who was there, please? First of all, where was it?

A. First, Kenneth Nelson phoned me relative to the—

Exam. Baumgartner: Just tell us where it was, Mr. Solomon. Don't go into any other detail. Just tell us where it was.

The Witness: Either at his home or at the place in Ellington.

Exam. Baumgartner: Where is his home?
 [fol. 313] The Witness: Manchester, Connecticut.

By Mr. Keenan:

Q. And by the place in Ellington, you mean the offices of L. Nelson & Sons in Ellington?

A. Correct.

Q. At that time did Gilbertville Trucking have offices at Ellington?

A. No, they did not.

Q. Who was present at that conference early in January?

A. Kenneth Nelson only.

Q. Kenneth Nelson and yourself?

A. That's right.

Q. When did the first conference occur between Kenneth Nelson and anyone who owned or represented the owners of Gilbertville Trucking Company at which you were present?

A. July 24, 1953.

Q. And who was present at that conference—withdraw that question.

Mr. Solomon, I'm confused now because my records lead me to believe that Mr. Nelson bought Gilbertville on March 1, 1953 and now you're telling me with reference to a conference that took place July, 1953 after the sale.

A. Excuse me. I understood you to say that I was present with the sellers of the stock and the purchaser of the stock.

Q. Let me restate my question again and attempt to be a little clearer about it. Will you tell me when the first conference occurred at which the sale of Gilbertville to Kenneth Nelson was a topic of discussion at which you were present and at which a representative of the seller was present or the seller.

A. In April of 1953.

Q. And where was that, please?

A. At attorney Samuel Zandan, who holds his office jointly with Francis J. Mahoney, accountant, both representatives of Gilbertville Trucking Company, Incorporated.

Q. Yes, sir. All I want to know is where:

A. 31 Elm Street, Springfield, Massachusetts.

Q. And who was there? Who was at that conference? You were there, right?

A. Right, and Mr. Zandan.

Q. Kenneth Nelson was there?

A. No, he was not.

Q. Will you tell me who was there? You, Mr. Zandan, and who else?

A. It was in Mr. Zandan's office with Mr. Mahoney, but Mr. Mahoney was away, and I was there with an associate of his and myself.

Q. Associate of whom?

A. Of Mr. Mahoney.

Q. And that associate was representing who, the seller?

A. That's right.

Q. And what was that associate's name?

[fol. 315] A. Give me a few minutes and I could look through my files and I can find his name.

Q. I don't think I will trouble you to do that. At that time had the contract of sale been drafted?

A. Yes.

Q. And what was the purpose of the conference in April of 1953 at Mr. Zandan's office?

A. To determine the good accounts receivable, the cash, the prepaid items, and the liabilities.

Q. I take it, therefore, that you had not been present at a conference where the seller was represented and where the drafting of the contract of sale had been discussed?

A. Correct, I was not present.

Q. Now, have you a copy of that contract for sale with you?

A. I have.

Q. May I see one, please?

A. This is the original draft.

Miss Kelley: It's a signed original.

By Mr. Keenan:

[fol. 316] Q. Mr. Solomon, by the contract which you just showed me signed by Wilfred Vachon and Kenneth Nelson,

Mr. Vachon undertakes to transfer or to deliver some stock of Gilbertville Trucking to some escrow agents. Do your records permit you to tell me the date on which this stock [fol. 317] transfer physically took place?

A. I testified yesterday it took place July 24, 1953 at the time of the final accounting.

Q. Did you state yesterday when the initial cash payment by the buyer, Kenneth Nelson, of \$10,000 was made?

A. I did not.

Q. Will you give me the date on which Mr. Nelson gave Mr. Vachon \$10,000?

A. Yes, sir.

[fol. 322] By Mr. Keenan:

Q. Well, the question actually which was asked at the beginning was when was that cash payment made?

A. March 3, 1953, \$10,000.

Q. And in what form was the payment made?

A. By check.

Q. A check made by whom?

A. I do not know.

Q. No, I didn't ask the question correctly. Who signed the check? Who drew the check?

A. I do not know.

Q. Do you know who made the payment?

A. Yes.

Q. Mr. Nelson?

A. Kenneth Nelson.

Q. How do you know Kenneth Nelson made the payment if you don't know who drew the check? Was he an endorser on the check?

A. No. He had borrowed money from the bank on March 2, an affidavit I'm holding in my hand, on March 3 he paid the \$10,000. I do not know, however, if he took the sum that he borrowed from the bank, placed it in a bank account, and then withdrew a check, I do not know that.

[fol. 323] Q. The source of the funds he used to pay that \$10,000 was a bank loan, however?

A. Correct.

Q. I see. Thank you. Did Mr. Nelson and Mr. Oscar Chilberg execute, as the contract provided, a note for \$10,000 payable to Wilfred Vachon, and did they do it on or before May 1, 1953 as provided for in the contract?

A. They did that before May 1 of 1953.

Q. Have you already told us when that note was executed and delivered to Mr. Vachon?

A. I believe the purchase agreement you have there in front of you states that it took place on March 3, 1953.

Q. The words that have caught my eye in the agreement, Mr. Solomon, are these: "This note is to be executed on May 1, 1953." The agreement purports to be dated March 2, 1953.

A. Then you will notice it's signed March 3 on the last page.

Q. At any rate it refers to a note that's to be executed in the future as of the date it was signed. My inquiry is do you know or do your records permit you to determine when that note was executed and delivered to Mr. Vachon? First of all, I should ask you was it executed?

A. Yes.

Q. Can you tell me when it was executed and when it was delivered to Mr. Vachon?

A. I cannot tell you when it was executed.

[fol. 324] Q. You do not have a copy of it, do you?

A. Of the note?

Q. Yes.

A. No. It has been paid since.

Q. It has been paid since?

A. Yes.

Miss Kelley: Mr. Examiner, I believe that the record is going to be quite confused by reference to this contract, and I ask leave at this time to submit it as an exhibit because I feel if, in reference to the contract, it can be referred to by exhibit number, it's going to clarify the record with reference to the particular agreement that Mr. Keenan has discussed.

Mr. Keenan: I join in Miss Kelley's request.

Mr. Mueller: I also concur in the request.

Exam. Baumgartner: The agreement dated March 2, 1953 by and between Wilfred J. Vachon and Kenneth Nelson providing for the sale of certain shares of stock in the Gilbertville Trucking Company to Mr. Nelson will be marked as Exhibit No. 22 for identification.

(The document above referred to as Applicant's Exhibit No. 22, Witness Solomon, was marked for identification.)

By Mr. Keenan:

Q. This will facilitate examination. Now the question I asked you originally about a \$10,000 cash payment, that is the payment, is it not, Mr. Solomon, that is provided [fol. 325] for or rather that is acknowledged on the second page of Exhibit No. 22, the third paragraph?

A. Correct.

Q. And the promissory note I talked to you about just now, is it not, that's referred to in the paragraph following on Page 2 of Exhibit 22?

A. Correct.

Q. Now, finally, if I recall correctly you do not know the date on which that note was executed?

A. Correct.

Q. You do, however, believe that it was executed?

A. I do.

Q. And why do you believe that?

A. I know that payments were made on the note directly to Mr. Vachon.

Q. I see. How do you know that the document itself was executed aside from the fact that you know that Kenneth Nelson made some payments to Mr. Vachon?

Miss Kelley: I object. That's immaterial. Mr. Solomon has gone over all his knowledge with respect to the note.

Mr. Keenan: I had marked in my notes a little item on cross-examination to find out what the source of his information was. He didn't tell us.

Exam. Baumgartner: You may answer.

The Witness: May I have the question restated.

[fol. 326] By Mr. Keenan:

Q. How do you know the note was executed other than the fact that you know Mr. Kenneth Nelson made some payments to Mr. Vachon?

A. That would be my only basis.

Q. That's the only basis for believing the note was issued?

A. Yes.

Q. Didn't Mr. Nelson ever tell you it was executed?

A. He most likely did.

Q. But you don't recall precisely if he did?

A. That's right. I'm doing it from my memory. There's no question in my mind there was a note.

Q. Well, however clear your mind may be on the matter, you have told us everything there is to prove there was such a note?

A. Correct.

Q. You haven't left anything out?

A. Correct.

Q. When were payments completed on the note?

A. From memory it was completed within one year of August, 1954.

Q. Therefore, August, 1955 it was completed, by August, 1955?

A. Oh, I'm sorry. It was August of 1954 it was completed by, meaning one year from August of 1953.

Q. And do you know the form which payments on that note took? In other words, were those checks?

[fol. 327] A. Absolutely, checks.

Q. You're sure of that? You saw them?

A. Positive.

Q. And who drew them? Who was the drawer?

A. Definitely it would be Kenneth Nelson.

Q. You say it would be. Do you know as a fact, or is this an inference you're making?

A. I'm doing it from memory as you can see. There is no reason why it should be anyone else other than Kenneth Nelson because it was a Gilbertville check.

Q. I see. However—

A. He's the only one who signs it.

Q. However, has anyone ever told you who signed those checks?

A. No, no one ever told me who signed the check.

Q. Had you ever seen any of the checks before they were dispatched?

A. I never saw any of the checks before they were dispatched, no.

Miss Kelley: To clean it up, Mr. Examiner, may I ask Mr. Solomon if he saw them after they were cancelled?

Mr. Keenan: I certainly agree.

The Witness: In the course of my audit I would see the checks that are cancelled.

By Mr. Keenan:

Q. Did you see these particular checks we're talking about, Mr. Solomon?

[fol. 328] A. I sure did.

Q. And who drew them when you saw them?

A. It could only be Kenneth Nelson.

Q. Do you recall that he drew them? Well, maybe we can simplify this thing. Did you see them in Mr. Nelson's financial records?

A. Correct. Not Mr. Nelson's financial records. In the financial records of Gilbertville Trucking Company, Incorporated.

Q. You saw these checks in the records of Gilbertville Trucking Corporation after they had been honored and cancelled, right?

A. Correct.

Q. When checks have been honored and cancelled, they are returned by the bank to the drawer?

A. Correct.

Q. And if you saw them in the records of the Gilbertville Trucking Company, would it not follow that the Gilbertville Trucking Company was the drawer?

A. I stated before that Gilbertville Trucking was the drawer.

Q. Then those payments on that note was made from funds in the treasury of Gilbertville Trucking?

A. Correct.

Exam. Baumgartner: Who signed on behalf of Gilbertville Trucking?

The Witness: Kenneth Nelson. He's the only one per-
[fol. 329] mitted to sign checks.

By Mr. Keenan:

Q. You have told us, have you not, that Mr. Vachon transferred and delivered stock certificates to Mr. Nelson and in turn Mr. Nelson transferred and delivered them to escrow agents?

A. Correct.

Q. These escrow agents were attorneys Zandan, and Paroshinsky.

A. Correct.

Q. And thereafter did the escrow agents transfer and deliver the stock certificates of Gilbertville Trucking, Inc., to Mr. Nelson?

A. Correct.

Q. When did that take place?

A. July 24, 1953.

Q. Now did you assist—you stated that Kenneth Nelson borrowed some money from the bank in order to make the \$10,000 cash payment that you and I have been just referring to. Did you assist Mr. Nelson in obtaining that loan?

A. I did not.

Q. Did you advise him on the course of his obtaining it, on the subject of his obtaining it?

A. I do not recall.

Q. I will withdraw the question. How do you know he obtained a bank loan?

A. I have in front of me, which I repeat, an affidavit.
[fol. 330] Q. May I see it?

Miss Kelley: May I see it first?

Well, this is on the record or not, I just want to make a comment I believe Mr. Solomon may be incorrect in what he considers an affidavit.

Is the statement sworn to?

The Witness: It's not sworn to, but it's from the President of the bank.

Mr. Keenan: Can we go off the record for a minute?

Exam. Baumgartner: Yes, off the record.

(Discussion off the record.)

Exam. Baumgartner: All right, back on the record.

You may read it into the record.

By Mr. Keenan:

Q. Mr. Solomon, you told me that you have a letter from a bank which is a source of your information concerning Mr. Nelson's borrowings, is that correct?

A. Correct.

Q. That letter was sent you in the regular course of business as a result of your soliciting this information from the bank by mail?

A. Correct.

Q. You recognize the letter from the bank as being an authentic communication duly signed?

A. Correct.

Q. You have received other communications from the [fol. 331] bank in the past?

A. Yes, I have.

Q. Would you read it?

A. It's a letter from the First National Bank of Manchester, Manchester, Connecticut, dated September 14, 1956.

"To Whom It May Concern: This is to certify that on March 2, 1953 Kenneth Nelson jointly with Oscar H. Chilberg borrowed from this bank on demand \$30,000 and on March 5, 1953 paid \$15,000 leaving a balance due of \$15,000. On April 30, 1953 Kenneth Nelson jointly with Oscar H. Chilberg borrowed \$15,000 on demand from this bank. At this writing Kenneth Nelson jointly with Oscar H. Chilberg are, therefore, indebted to this bank in the total sum of \$30,000. Very truly yours, Shirley Harrington, President."

Q. Would you give us the date of that letter?

A. September 14, 1956.

Q. Is that the full extent of your information concerning Mr. Nelson's bank borrowings?

A. May I have that question repeated?

Q. Let me withdraw it. It's too broad. Do you know what, if any, security Mr. Nelson gave the bank for these loans?

A. I do not know.

Q. Do you know whether these loans were secured in any way?

A. I do not know.

[fol. 332] Q. You have stated, sir, that Oscar Chilberg on January 19, 1954 resigned as Treasurer of Gilbertville Trucking Company and he transferred his 48 shares of stock in Gilbertville, 24 of them to Phyllis Nelson and 24 of them to John Kashady. Do I recall your testimony correctly?

A. As I understand your question, January, 1954?

Q. January 19, 1954.

A. On April 1, 1954 I testified yesterday that Oscar Herbert Chilberg resigned as Treasurer and he gave 24 shares; that is, he gave all 48 shares to Kenneth Nelson.

Q. Oh, I see. And thereafter Kenneth Nelson transferred 24 of them to his wife, Phyllis?

A. Correct.

Q. And 24 of them to John Kashady?

A. Correct.

Q. Have you already told us the date on which that transfer took place? Was that also on April 1, 1954?

Miss Kelley: Mr. Examiner, while Mr. Solomon is checking that—wait just a moment, Mr. Solomon—I wondered if we could have Mr. Solomon asked at this point for the sake of clarity in the record as to whether or not Oscar Chilberg had paid any consideration for those 24 shares. Where it is being discussed, if it could be brought up now it would make it simpler as far as the record is concerned.

Mr. Keenan: It's all right with me.

[fol. 333] Exam. Baumgartner: What's the pending question?

By Mr. Keenan:

Q. When did Nelson make the transfer to his wife and John Kashady?

A. In the minute book or the stock transfer book on hand here—I do not know the exact date.

Q. Are they here?

A. I see the minute book in Kenneth Nelson's hand right now.

Q. Will you refer to it so that you can give me an answer?

Miss Kelley: Rather than delay, can we have Kenneth check it so we'll find the page and furnish it later?

By Mr. Keenan:

Q. Miss Kelley suggested that you tell us where Oscar Chilberg got the money—no, what consideration, if any, Oscar Chilberg paid for his 48 shares.

A. Oscar Chilberg never did pay in anything for the shares.

Exam. Baumgartner: Were they a gift?

Mr. Keenan: I think I can square this away, Mr. Examiner.

The Witness: The money for the transaction arose from the bank loan, Mr. Examiner. All he did was sign the note.

By Mr. Keenan:

Q. Well, now, of course Oscar Chilberg was not a party to the contract of sale as a result of which the stock was acquired from Mr. Vachon. I'm referring to Exhibit 22, is that right?

Miss Kelley: It's obvious.

By Mr. Keenan:

Q. He didn't sign it, Mr. Solomon? I just want it to be clear on the record.

[fol. 334] Miss Kelley: The agreement shows it to be between Mr. Vachon and Mr. Nelson, Mr. Examiner.

Mr. Keenan: I understand counsel stipulates. You needn't answer the question, sir.

By Mr. Keenan:

Q. That would mean to me at sometime Mr. Nelson transferred 48 shares of stock to Oscar Chilberg, right? My question to you is basically, do you know of any such transfer?

A. I do not know.

Q. When you stated on direct examination that Oscar Chilberg at one time held 48 shares of Gilbertville Trucking Company stock, will you tell me why you said that?

A. It stated in the stock transfer book of the corporation.

Q. And that same stock transfer book would show us what the prior transfers were between Oscar and Nelson, right?

A. Definitely.

Miss Kelley: For the purpose of clarifying this, Mr. Examiner, I am willing to stipulate that the 48 shares of the stock of the Gilbertville Trucking Company were issued to Oscar Chilberg, he not paying any consideration for them, that upon issuance to him of that number of shares, plus the 51 shares, I believe; that were issued to Kenneth Nelson, that both stock certificates were then pledged in escrow as security for the \$10,000 note which was jointly executed by Oscar Chilberg and Kenneth Nelson and given to Mr. Vachon, the previous stockholder of Gilbertville. [fol. 335] Then, upon payment of that note, that \$10,000 note, the 48 shares to Oscar Chilberg as well as the shares to Kenneth Nelson were released.

Exam. Baumgartner: And returned to him?

Miss Kelley: That's right, and at that time it went into the possession of Kenneth Nelson because Oscar Chilberg had paid no consideration other than lending his name as a co-maker.

Mr. Keenan: I will accept that stipulation, Mr. Examiner.

Exam. Baumgartner: Very well. I don't know whether you want to confirm it with Mr. Mueller.

Miss Kelley: Incidentally, I have checked the record book of Gilbertville Trucking Company and find that Oscar Chilberg resigned April 1, 1954, he resigned as director and treasurer of Gilbertville Trucking Company and the res-

ignation to take effect immediately. The record also shows that in a meeting held on April 9, 1954, John Kashady was elected as a director, and Kenneth Nelson becoming the treasurer of Gilbertville Trucking Company on that date.

Mr. Keenan: That's April 9th, 1954?

Miss Kelley: April 9, 1954. We do not have the certificates with us, but this is the best evidence we have in the hearing room if you care to see the resignation and the meeting I have no objection.

Mr. Keenan: I will stipulate that Miss Kelley's statement is the truth, if the Examiner cares to accept the stipulation. [fol. 336] Exam. Baumgartner: Do you other gentlemen agree with Mr. Keenan?

Mr. Barrett: I have no objection.

Mr. Mueller: I have no objection.

By Mr. Keenan:

Q. Now I would like to find out when that 24 shares of stock were transferred from Kenneth Nelson to John Kashady in view of the fact that John Kashady became director, I believe, it was on April 9, 1954. It's likely that it's the date of the stock transfer, but I would like to nail it down.

Miss Kelley: Do you know, Mr. Solomon?

The Witness: I do not know.

By Mr. Keenan:

Q. Well, you said you've got a transfer or stock book?

Miss Kelley: I told you there was nothing else in the book except what I described. We don't have the other available in the room.

By Mr. Keenan:

Q. Mr. Solomon, what's the source of your confidence that it is true that at sometime or another, Mr. Kashady acquired 24 shares of Gilbertville Trucking?

A. I had seen the stock transfer book.

Q. But you don't recall when the transfer was made?

A. Correct.

Q. You don't recall what the stock transfer book reflected as to when the transfer was made?

[fol. 337] A. Correct.

Q. And you haven't brought that stock transfer book with you?

A. I did not.

Mr. Keenan: May we go off the record just a minute?

Exam. Baumgartner: Off the record.

(Discussion off the record.)

Exam. Baumgartner: We are on the record now.

By Mr. Keenan:

Q. Mr. Solomon, you stated that this stock transfer, the date of which we can't determine, from Mr. Nelson to Mr. Kashady was made in order to increase Mr. Kashady's prestige? Do I recall your testimony substantially?

A. Correct.

Q. Now, how do you know that? Did somebody tell you that that was the purpose of the stock transfer?

A. Correct.

Q. Who told you?

A. Kenneth Nelson.

Q. When did he do so?

A. I believe I testified to this too prior, that it was at Mr. Kenneth Nelson's house sometime in 1954.

Q. He told you this at his house sometime in 1954?

A. Yes.

Q. Is that the only time he told you that or did he tell it to you subsequently?

Miss Kelley: I object to the searching on an immaterial [fol. 338] point, Mr. Examiner.

The Witness: I do not know if he told it to me again.

By Mr. Keenan:

Q. Here's the only reason I ask you this, sir: You have stated two or three times on direct and I'm a little bit

puzzled why you remember this detail of motivation. If it was told you once at the time you can't remember, what has caused it to stick in your mind? What's the significance of it?

A. It was at Kenneth Nelson's house, and usually I see him at either my office or at his office, and at this particular time Mr. Kashady was there; and because of Mr. Kashady, I can easily identify the motive for giving Mr. Kashady the stock because it was said to me right then and there in the presence of Mr. Kashady why it was given to him.

Q. He is not in the room now, is he?

A. No.

Q. Now, when you say, "lend him prestige," may I inquire prestige with whom, his fellow workers?

A. I testified prior that he is a supervisor of the Gilbertville, Massachusetts terminal. It's giving him a title with his fellow employees, customers.

Q. Mr. Nelson wanted to give him the stock because it would lend him prestige. In other words, it would cause his subordinates and his associates in the business to think more highly of him, is that correct?

[fol. 339] A. Correct.

Q. And also it would cause the customers to think more highly of him?

A. Correct.

Exam. Baumgartner: Where did you get that information, Mr. Solomon?

The Witness: At Kenneth Nelson's house in the presence—

Exam. Baumgartner: He told you this?

The Witness: Correct, in the presence of Mr. Kashady.

By Mr. Keenan:

Q. Did Mr. Nelson tell you how it was going to be noised about the customers that Mr. Kashady had 24 shares?

Miss Kelley: I object.

Exam. Baumgartner: I think you are going into too many details here. My goodness, let's proceed with something more important.

By Mr. Keenan:

Q. Mr. Kashady paid nothing for those shares?

A. Correct.

Q. He still has them?

A. Correct.

Miss Kelley: Wait a minute. Did you get that question?

The Witness: He still has not paid them.

By Mr. Keenan:

Q. My first question was he has paid nothing, and your answer was no, and my next question was does he still have the 24 shares?

A. I do not know.

[fol. 340] Miss Kelley: May I object.

Exam. Baumgartner: Just a moment.

Miss Kelley: Do you mean is he still the registered holder? Do you mean by that question that Mr. Kashady is still the registered holder of 24 shares, or do you mean does Mr. Kashady have the certificate in his own hand by that question? There are two ways it can be interpreted.

Mr. Keenan: Evidently there's a distinction here.

By Mr. Keenan:

Q. Do you know whether he has the physical possession of the certificates?

Exam. Baumgartner: If you know.

The Witness: I do not know.

By Mr. Keenan:

Q. Do you know whether he is the registered holder on the corporation's books, on Gilbertville's books?

A. On my last audit he appeared as the registered holder.

Q. Of 24 shares?

A. Of 24 shares.

Q. When was your last audit?

A. An audit of that nature probably took place in March of 1956.

Q. Now, has Gilbertville declared any dividends in the last year or two?

A. No.

Q. At sometime you testified on direct you advised Kenneth Nelson to speak to Miss Kelley concerning a merger [fol. 341] between Gilbertville and L. Nelson & Sons. Do you recall that?

A. Yes, I do.

Q. Will you tell me why you suggested he speak to Miss Kelley?

Miss Kelley: I object to just the form there as to—oh, strike it.

The Witness: I suggested to Kenneth Nelson that he speak with Miss Kelley for the purpose of—if there was a possibility of a merger with the Nelson Corporation.

Exam. Baumgartner: Speak to whom?

The Witness: To Miss Kelley.

Exam. Baumgartner: I have forgotten, who is Miss Kelley?

Mr. Keenan: She's the attorney of the case.

Exam. Baumgartner: Oh, this is Miss Kelley.

Miss Kelley: Yes, sir.

By Mr. Keenan:

Q. Do I infer correctly from your answer, Mr. Solomon, that you expected that Miss Kelley would be able to speak in behalf of L. Nelson & Sons on this thing?

A. Oh, no.

Q. I confess it's still not clear in my mind why you sent Mr. Nelson to Miss Kelley.

A. I confess I know nothing of legal problems or of any ICC regulations, and that is the reason why I sent Kenneth Nelson to see Miss Kelley.

Q. You sent him to Miss Kelley because you wanted to get the ICC regulatory, legal problems out of the way, is that it?

[fol. 342] A. If she would discuss the problem with him and if there was any chance of a merger.

Q. Then what?

Miss Kelley: I think that completes the answer.

Exam. Baumgartner: I think that finishes the answer.

Mr. Keenan: The witness' syntax has me a little confused.

Exam. Baumgartner: Taking that into account, I think his answer is complete.

The Witness: Someone's got to make the application.

By Mr. Keenan:

Q. Now finally, sir, Exhibit 9 is a document to me which I am not entirely sure of. On direct examination you told us that you wanted to make use of the ratio between the net book of Nelson and the net book of Gilbertville. Do I recall that correctly?

A. Correct, sir.

Q. Well, my crippled mathematics led me to believe that that ratio was something like 16.4 percent.

A. As of what date.

Q. July 31, 1956.

A. I believe you will find the percentage to be 15.63.

Q. That's very likely true.

A. Yes, sir.

Q. Now on Exhibit 9 you have a figure 78 shares.

A. Yes, sir.

Q. Will you tell me the arithmetic that was used to get [fol. 343] that figure of 78?

A. 500 shares that Nelson now has, and if you multiply 500 shares by 15.63 you will then receive 78 shares.

Q. If you multiply it by point?

A. By 15.63.

Q. If I multiply 500 by 15?

Exam. Baumgartner: He's talking about 15.63 per cent.

The Witness: Then take off four places.

By Mr. Keenan:

Q. Yes, sir. Now, finally to make it perfectly clear on the record, is it true that you derived this figure of 15.63 per cent by dividing 24,588 by 157,443?

A. Correct.

Q. And all three of those figures I have just mentioned are set forth on Exhibit 9?

A. Correct.

Q. No, 15.63 per cent is not.

A. You're right.

Q. Now could I take a look at that green sheet you were using?

Mr. Keenan: May I have Miss Kelley's permission to do so?

Miss Kelley: I gave my permission the other night, Mr. Keenan.

By Mr. Keenan:

Q. When you testified about Exhibit 11—

Mr. Keenan: Mr. Examiner, may we show on the record that the green sheet is a memorandum which Mr. Solomon [fol. 344] had in his possession.

Exam. Baumgartner: When?

Miss Kelley: During the course of his testimony on direct which he had prepared himself.

By Mr. Keenan:

Q. Mr. Solomon, your testimony on direct reflected that the Applicants expect to accomplish a saving in the expense of tires and tubes after the merger. What's the source of your information concerning that?

Miss Kelley: Mr. Examiner, may I inquire from Mr. Solomon if he needs his memorandum in order to give some answers.

The Witness: I spoke to both Kenneth Nelson and Charles Chilberg.

By Mr. Keenan:

Q. And they told you direct?

A. That's right.

Q. The sole source of your information is what they told you?

A. Correct.

Q. To shorten up this examination, is it true that the source of your information concerning the economies that can be achieved as reflected on Exhibit 11 is in each case information they gave you?

A. No, it is not.

Q. Will you point out to me the exceptions to that?

A. Definitely. The savings in insurance I came across myself in the examination of two different companies.

Q. That's Item 4550?

[fol. 345] Exam. Baumgartner: 4500 you mean?

The Witness: 4500 is correct, sir.

Exam. Baumgartner: Off the record,

(Discussion off the record.)

Exam. Baumgartner: Back on the record.

By Mr. Keenan:

Q. Mr. Solomon, do I understand correctly that you are the person who reached the conclusion without the assistance of anybody else that the savings under Account 4500 would be realized by the merger?

A. After sometime ago noticing the difference in the cargo insurance rates, I then spoke to either Kenneth Nelson and Charles Chilberg if it was correct and they stated it is.

Q. If what was correct?

A. The difference in the rates.

Exam. Baumgartner: You mean the savings?

The Witness: That's correct.

By Mr. Keenan:

Q. Any other exceptions to it?

A. Yes, the administrative and general, that's Account No. 4600 is entirely my own which reflects a savings of \$12,061. It's very obvious for me to see that.

Q. All right. Now you talked, do I recall correctly, about releasing office help to secure better control of costs? That's

part of your administrative and general savings. Can you answer that yes or no?

A. I didn't say anything about releasing office help. I [fol. 346] mean that the person who probably is doing a certain function in the office then could be doing something that they're not doing now. For instance, keeping better control of costs.

Q. Well, have you assigned any kind of a monetary value to the savings that would result from such better control of costs?

A. I have not.

Q. What's the printing matter that you expect to eliminate and achieve a saving of \$13,357?

A. The saving—you didn't mean to say that. You meant \$2,000, didn't you?

Q. Thank you, sir.

A. Mr. Keenan meant to say that of \$13,357 why did I specify here that 20 per cent or \$2,671.40 would be saved on printing matter.

Q. I thank the witness for the correction and guidance. Would you answer the question, please.

A. The \$13,000 of office supplies are actually in the majority of cases duplications that are purchased by Nelson and also for Gilbertville. If they bought the quantity as one company, there certainly would be a savings. For instance, on envelopes, stationery, all your bills.

Q. Well, Mr. Solomon—

A. These are minimum savings.

Q. Yes, Mr. Solomon. How did you arrive at this figure of 20 per cent? Did you do any arithmetic or is it a judgment figure? [fol. 347]

A. Judgment figure.

Exam. Baumgartner: Where does that figure appear that you're discussing now?

Mr. Keenan: Under Account 4600.

Exam. Baumgartner: That's the difference of 106,000 and—

Mr. Keenan: I'd rather get my copy of Exhibit 11.

The Witness calculated total savings of \$12,061.

The Witness: That's right.

Mr. Keenan: One of the items in that \$12,061 is \$2,671.40 reflected by the witness memorandum and I think possibly included in his testimony on direct that would be saved as a result of reducing duplication of office supply purchases and printing. That represents 20 per cent of the present annual expense of such office supplies, namely, \$13,357. . .

The Witness: Correction. That is not the annual figure. That's a 7-month figure.

Mr. Keenan: A 7-month figure?

The Witness: Yes, sir.

Miss Kelley: The \$13,000 figure you gave was the total figure, is that it, at the present time?

Mr. Keenan: That's right.

Miss Kelley: Thank you.

By Mr. Keenan:

Q. Well, actually what I'm trying to find out, Mr. Solomon, is what's the basis for a judgment that 20 per [fol. 348] cent is on economic duplication right now? Have you inventoried the present office supplies.

A. I have not inventoried the present office supplies.

Q. Do you know how many office pads are used a month or year, how many envelopes or sheets of stationery?

A. I don't.

Miss Kelley: I object, Mr. Examiner.

Exam. Baumgartner: Mr. Keenan, I think the witness said that 20 per cent was a judgment figure. Now I don't know if it will profit us anything if you go into all this detail that you're now driving at.

Mr. Keenan: All right, sir.

By Mr. Keenan:

Q. What's your experience in making such judgments, Mr. Solomon?

Miss Kelley: I object. Mr. Solomon is an accountant.

The Witness: I have been 27 years a public accountant. I am an industrial engineer.

By Mr. Keenan:

Q. That's it?

A. That would be it.

Q. Now what's the 7-month cost until July 31, 1956 incurred by both Gilbertville and by Nelson in preparing bills and checking bills on interline movements?

A. Did you say what's the total cost?

Q. Yes, for 7 months.

A. I do not know. I didn't compute this in the same [fol. 349] relation as I computed the printing matter. I didn't base it on that.

Q. Now you have computed there would be a saving of \$8,800 during the 7-month period ending July 31, 1956 in the preparing of bills and checking of bills on interline movements.

A. Yes.

Q. Will you tell me what the basis of that computation is?

A. There are several girls who now do the preparation of bills and the checking of bills. I know definitely that three of them may be eliminated.

Q. And why do you know that definitely?

A. That is, when they terminate their present positions, the positions would not be filled again.

Miss Kelley: Mr. Solomon, just for the sake of clarification, when you say, "terminate their present positions," what do you mean by that?

The Witness: As the turnover of help—

Mr. Keenan: Oh, I see.

Exam. Baumgartner: The positions would not be refilled?

The Witness: That's right, the positions would not be refilled.

By Mr. Keenan:

Q. Why not? In other words, what's the different condition that's going to attain in the future that doesn't exist now?

A. On interlines, for instance, the bill has to be made up. If they were merged, there wouldn't be two sets of bills [fol. 350] being made up.

Q. Interlines between whom, between Gilbertville and Nelson?

A. Correct.

Q. Oh, you mean Gilbertville and Nelson are doing so much interline business that you—

A. No, that is part of the answer.

Q. What's the rest of it?

A. The duplication of the two different girls, for instance, for two different companies doing the same type of work. It could take place by one girl or a girl and a half.

Q. Let's take those things one at a time. What percentage of Nelson's daily pros represent interlines with Gilbertville, do you know?

A. Offhand, I could not give you that answer.

Q. Have you ever found out what the answer to that question was?

Miss Kelley: I object. This is again such detail.

Exam. Baumgartner: This is detail, Mr. Keenan. I think we ought to try to cut this short now, or we're going to be here until midnight. I promise we are going to get this hearing completed by Friday night.

Mr. Keenan: The witness has made some estimates. I don't see why we are not entitled to find out what that saving is.

Exam. Baumgartner: If you must have it, let's get it on [Vol. 351] the record, but I don't see what it profits you to go into all this fine detail. You're not going to refer to it in your brief, I'll bet you.

By Mr. Keenan:

Q. For the period from January 1, 1956 until July 31, 1956 have you determined what proportion of Nelson's pros represent interlines with Gilbertville?

Miss Kelley: That's repetitious.

The Witness: I do not know.

Mr. Keenan: I didn't understand the witness to answer with respect to that period.

By Mr. Keenan:

Q. The answer is no?

A. That's right.

Q. Aside from the question of eliminating interline billing between Gilbertville and Nelson, what was the reason why you'd be able to eliminate some of this billing work?

A. The two girls in the two separate companies are doing the same type of work.

Q. Do you mean at the present time that each one of those girls is not occupied during her complete day?

A. She's occupied, but she may be doing work that's just as easy for one, one billing rather than two separate billings.

Q. Is it the elimination of these two girls which occurs for the full \$8100?

A. Actually three girls at \$52.50 a week.

Q. Have you explained the reason why you'd be able to [fol. 352] eliminate the three girls fully? In other words, is there anything more you want to say about it?

A. No.

Mr. Keenan: I have no further questions.

The Witness: My accounting fee, that would be saved.

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[fol. 353] By Mr. Keenan:

Q. Just one further question on this matter of administrative and general, Mr. Solomon. Do Gilbertville and Nelson employ the same printer today to get up their office supplies and stationery?

A. There are numerous printers and persons they buy their office supplies from. I would say in many cases they do purchase from the same supplier.

Q. And do they have their stationery printed by the same [fol. 354] printer?

Miss Kelley: I object. What's the materiality if they go to the same printer?

Exam. Baumgartner: I can't see it either.

Mr. Keenan: I claim the question.

Exam. Baumgartner: You do what?

Mr. Keenan: I claim the question, if the Examiner please.

Exam. Baumgartner: Go ahead with it. I can't see the materiality of it.

The Witness: I do not know.

[fol. 356] By Mr. Keenan:

Q. Did somebody owe Kenneth Nelson \$20,000 on July 31, 1956?

Miss Kelley: We went all into this yesterday.

Mr. Keenan: There's N.P. in your notes.

The Witness: N.P. means Notes Payable.

By Mr. Keenan:

Q. When you stated previously, sir, that there were some records of Gilbertville Trucking Company and L. Nelson & Sons at the same address in Ellington, Connecticut, you then went on to say they were the main records, if I recall correctly. Will you tell me what you mean by main records?

A. The journals, the ledgers, it would be entirely everything except any subsidiary records that would be kept at a terminal. Eventually the terminal records would wind up in the main office.

Q. So that whatever records there are at the terminals, do I understand correctly, eventually would be reported either in copies or in summary form to the main office?

A. Correct.

Q. And in the final analysis, then, at Ellington you could get an annual record of all business transactions by both corporations, L. Nelson & Sons and Gilbertville Trucking Company, right?

[fol. 357] A. Correct.

Q. You also said the first floor was devoted to Nelson & Sons something or other, and for some reason you were interrupted and I was curious to know what that was devoted to, Nelson's business?

A. That is right.

Q. The second floor is devoted to Gilbert's business?

A. Entirely, yes.

Q. How many telephone lines run into that building at Ellington, do you know?

A. I do not know. There are several.

Q. Is it possible, is there a switchboard by which you can cross-switch from one floor to the other and from one corporate headquarters to the others in incoming telephone calls?

A. That is right.

[fol. 358] Q. Are you a CPA?

A. No; I am in the state of New York, yes.

Q. Other than the Nelson Corporation, do you do any accounting work for any interstate commerce carriers?

A. No others.

Q. And your limit of experience has been the companies that are involved in this proceeding for accounting?

A. For accounting?

Q. Yes, in that field, in the transportation field.

A. In the transportation field, yes.

Q. Now, sometime in March of 1953 you testified there was a note for \$10,000 from Kenneth Nelson and Oscar Chilberg to a Mr. Vachon, correct?

[fol. 359] A. In March of 1953?

Q. About that time.

A. Yes, sir.

Q. And that the balance of \$13,000 in cash was paid to Mr. Vachon after being held in escrow until July of 1953?

A. No, that isn't right.

Q. A note for \$10,000 was given to Mr. Vachon and there was a balance paid to Mr. Vachon of \$13,000 or an additional amount.

Miss Kelley: Mr. Examiner, possibly I could help Mr. Solomon in his recollections to save time. Mr. Solomon, do you recall in your original testimony that there was a question as to the net amount which Mr. Vachon got after the payment of the obligations? I don't recall whether it was 13 or 15.

The Witness: I mentioned that Mr. Vachon received \$22,474.04.

Exam. Baumgartner: Net?

The Witness: Net. Of course, the corporation had liabilities prior to—

Exam. Baumgartner: We are not interested in that angle now.

Mr. Barrett: Well, I use 13,000 for a round figure.

The Witness: Yes.

By Mr. Barrett:

Q. And that \$23,000, using a round figure, was made up of a \$10,000 note which we just talked about, is that correct? [fol. 360] A. See, it cost Kenneth Nelson exactly \$35,000, no more, no less.

Q. Just answer my question. We are probably a little confused on the way my question is framed, and I took it from my notes. Mr. Vachon received a net of \$13,000, correct?

A. Yes.

Miss Kelley: Speak up so the Reporter can hear.

The Witness: Yes.

By Mr. Barrett:

Q. \$23,000, round figure?

A. Yes.

Q. That \$23,000 was made up of a promissory note in the amount of \$10,000?

A. Right.

Q. And the balance was in cash and was held in escrow by an attorney or more than one attorney?

A. That is right.

Q. Now, according to your figures there should be a balance of \$12,000 that Mr. Nelson would have paid to make the \$35,000 figure, is that correct?

A. No, that's incorrect.

Q. If everything in the corporation balanced out he would have paid a net of \$35,000?

A. He did pay thirty-five.

Q. We have accounted for \$23,000 of it, correct, the note and the cash?

[fol. 361] A. Yes.

Q. Now that's what I'm getting at, the additional \$12,000.

A. Yes.

Q. To whom was that paid and how was it paid?

A. See, beginning March 3, 1953 the escrow agents had on hand \$35,000 less \$10,000 that was given to Mr. Vachon as a note payable. In other words, \$25,000 they had.

Q. In cash?

A. Correct. Between March 3, 1953 and July 24, 1953 the escrow agents then disbursed various liabilities that were incurred under the predecessor stockholder.

Q. To the tune of \$12,000?

A. Correct.

Exam. Baumgartner: These expenditures by the escrow agents were for the account of the Gilbertville Trucking Company?

The Witness: Gilbertville Trucking Company, Incorporated.

Exam. Baumgartner: To liquidate their obligations?

The Witness: Correct, sir.

By Mr. Barrett:

Q. To clear up the record at the request of your own counsel, would you explain at this point the bookkeeping entries as to that money that was used by the escrow agents to pay these expenses or liabilities of Gilbertville Trucking?

A. Yes. The corporation has on its books liabilities for \$14,000. The escrow agents pay out the \$14,000. Therefore, [fol. 362] the liabilities are cancelled on the corporation's books.

Q. Was that \$14,000 actually put through the banking account and books of Gilbertville Trucking Company?

A. I could not answer that right now.

Exam. Baumgartner: Just a moment. I'm a little confused. A little while ago the answer was given on the basis of an out payment by the escrow agents of \$12,000 to liquidate the obligations of Gilbertville Trucking Corporation.

The Witness: It was used in round figures. It's actually \$14,000.

Exam. Baumgartner: A moment ago you mentioned a figure of \$14,000.

The Witness: I believe Mr. Barrett knows.

Mr. Barrett: Mr. Examiner, we are using round figures. Actually, if it was carried out to hundredths of dollars it would actually be 14 instead of 12.

The Witness: It's \$14,992.36, and what he is inferring there is that would then be subtracted from the amount.

Miss Kelley: Mr. Examiner, at this point and for clarity on the record, I spoke to Mr. Barrett and asked if he had any objection to asking that question. Now I'm no bookkeeper, but this is the point that struck me, that it is my understanding that since the liabilities were on the books of the Gilbertville Trucking Company for this roughly \$14,000, that something had to be reflected as being paid into Gilbertville Trucking Company to satisfy that \$14,000. [fol. 363] Exam. Baumgartner: Yes.

Miss Kelley: In other words, there had to be an offset, from my general understanding of bookkeeping, and I thought that if at this point in the record we could have Mr. Solomon describe those bookkeeping entries as to whether that \$14,000 went on the books as a loan to somebody or just what it was, that it might be helpful for us all to understand this matter when we come to this part of the record.

Exam. Baumgartner: Did he explain the bookkeeping entries to your satisfaction?

Miss Kelley: Not so that I understood it.

The Witness: It's not a loan from—

Exam. Baumgartner: Please just explain the bookkeeping entries that were made.

The Witness: The sum of \$14,000, \$14,992.36 was paid out by the escrow agents.

Exam. Baumgartner: Was it paid out by them directly to the creditors, or did the money pass through the Gilbertville Trucking Company accounts?

The Witness: Frankly, I do not remember whether it was paid directly by the escrow agents or from the funds of the corporation.

Exam. Baumgartner: Well, if it was paid from the funds of the corporation, what was the source of those funds, or [fol. 364] do you know?

The Witness: The source of the funds then would be, if it was paid from the corporation, it was funds that Kenneth Nelson gave to the escrow agents.

Exam. Baumgartner: I see. It would pass from the escrow agents into the books of the corporation, is that what actually took place, do you recall?

The Witness: I'm quite positive it did.

Miss Kelley: Well, Mr. Examiner, you must know more about this than I do.

Exam. Baumgartner: I don't.

Miss Kelley: Well, for example, I was involved in another transaction that was somewhat similar where there were obligations of the company that were paid out of the escrow funds, and my understanding in that proceeding was that the funds that were used by the escrow agents to discharge the obligations of the corporation were reflected on the books of the corporation as a loan from the new stockholders.

In other words, this money was shown coming in and then as paid out to discharge the obligations even though it was handled through escrow agents, and frankly that is what I'm concerned about here and wondering just how that was handled, so that if it might have been reflected as a receivable, for example, back to Kenneth Nelson or if it was—

The Witness: I looked it up and it was handled as a note [fol. 365] payable to Kenneth Nelson and Oscar H. Chilberg.

Exam. Baumgartner: Note payable in what amount?

The Witness: The figure I have here as of July 31, 1953, \$13,247.40.

Exam. Baumgartner: That was the obligation of the Gilbertville Trucking Company?

The Witness: That's right.

Exam. Baumgartner: Obligation paid to Kenneth Nelson and Oscar.

The Witness: What was that, sir?

Exam. Baumgartner: That note was an obligation of the Gilbertville Trucking Company.

The Witness: A note of the Gilbertville Trucking Company, that's right.

Exam. Baumgartner: Payable to Kenneth Nelson and Oscar Chilberg?

The Witness: Correct.

Mr. Barrett: All set, Mary?

Miss Kelley: Thank you very much, Mr. Barrett.

By Mr. Barrett:

Q. Do you know when, if at all, that note was discharged by Gilbertville Trucking?

A. Yes. Prior to August 1st—which note are you referring to now?

Q. That one that was reflected for the payment of the liabilities. The one you were just talking about.

[fol. 366] Miss Kelley: For clarity, the \$13,247.40.

The Witness: That note has not been paid.

By Mr. Barrett:

Q. Looking at Exhibit B-4 of the application, notes payable to officers of fourteen thousand odd dollars.

A. Notes, payable, yes, sir.

Miss Kelley: Mr. Keenan, could I ask if you would give Mr. Barrett a copy of the application which I loaned you? It may help him and it would relieve the record for the Examiner so that he might know what's going on.

Exam. Baumgartner: If there's a shortage out there, I don't mind sharing it with the witness.

Mr. Keenan: No shortage, sir, it's okay.

Miss Kelley: I loaned one to Mr. Keenan which he put in his bag or something.

By Mr. Barrett:

Q. Did you answer the question, Mr. Solomon?

A. Would you mind restating it please?

Exam. Baumgartner: Would you read the question, Miss Reporter?

Mr. Barrett: I can restate it.

By Mr. Barrett:

Q. On Exhibit B-4 attached to the application, the balance sheet of May 31, 1955, there's a note payable to officers in the amount of fourteen thousand odd dollars. Is that the same note?

A. No. It would be part of the same note. Some monies go in and then Kenneth Nelson may have salaries credited [fol. 367] to him on the books and he hasn't withdrawn the full salary.

Q. You just stated that note of fourteen thousand odd dollars that was given to Mr. Nelson and Mr. Chilberg to discharge the liabilities has not been paid as yet. Has any part of it been paid?

A. Of the particular note?

Q. That's right.

A. It must have been, part of it may have been, a thousand or so paid at one time or another.

Q. Well, you say must have been. Is the answer you don't know, or do you know?

A. I do know that part of it was paid. Exactly what part of the original note, I couldn't tell you. He is given credit for all his notes.

Q. Did you prepare this Exhibit B-4 of the application?

A. I did.

Q. As of May 31, 1955 your records reflect just what notes and what amounts Gilbertville owes officers?

A. Notes payable of May 31, 1955, \$14,037.75.

Q. I know. I have that in front of me. The breakdown of individual notes to make up that total amount.

A. All to Kenneth Nelson.

Q. And how many individual notes or loans are reflected in this \$14,000 figure?

A. I could not say how many.

Q. Do you have any records with you?

[fol. 368] A. No, sir.

Q. Is all that money in that notes payable account reflected by executed notes, or is some of it just loaned?

A. That's right, some of it is without a note to him.

Exam. Baumgartner: Loans without notes?

The Witness: That is correct.

Mr. Keenan: Running accounts?

The Witness: Running accounts they would be. They vary each month.

By Mr. Barrett:

Q. Now as I understand it, Mr. Solomon, when Kenneth Nelson took over control of the Gilbertville stock all the current assets of Gilbertville were washed out, and in other words the cash and the accounts receivable were taken over by Mr. Vachon.

A. No.

Q. I misunderstood your testimony then.

A. The agreement is \$35,000 coming from Kenneth Nelson plus whatever cash there was in the corporation, plus good accounts receivable, plus prepaid items.

Q. I don't mean to interrupt you. All right, then, the cash that was in there and the good accounts receivable, if any, were used as a credit against the current liabilities, is that correct?

A. That would be it.

Q. In addition to that, this additional \$14,000 was necessary to discharge liabilities also, is that correct?

A. Excuse me, I'll look that up. In addition, the liabilities themselves, \$14,992.36.

Q. Now, that being so, wasn't the intent of Mr. Nelson to take over the corporation free of all current liabilities?

A. Free of all liabilities that were incurred prior to his taking over the capital stock.

Q. Now, he acquired some equipment in that deal, is that correct?

A. Correct.

Q. Was there any obligations outstanding on the equipment at that time?

A. I'll give you that in a moment. There were no obligations on any equipment when Kenneth Nelson took over as of March 1, 1953.

Q. So, then, in effect Mr. Nelson, Kenneth Nelson, took over free of any liabilities the Gilbertville Corporation, forgetting the capital stock items, is that correct?

A. That is correct.

Q. And on the assets side of the picture, when Mr. Kenneth Nelson took over there was the equipment, the rolling stock, office equipment, if any, and the organization expense and the franchise expense was carried on the books, is that correct?

A. That's substantially correct.

Exam. Baumgartner: Materials and supplies too?
[fol. 370] The Witness: Excuse me, I'll look at the balance sheet here. There were prepaid insurance, and the original organization legal fees, that would naturally still remain on the books as an asset, the ICC rights as an asset, and the revenue equipment.

By Mr. Barrett:

Q. And the office furniture, correct?

A. Right, sir.

Q. At that time what was the ICC franchise of Gilbertville carried on the books, at what amount?

A. \$1,250.

Q. Now, as of the date that Mr. Nelson took over there was no working capital in the Gilbertville corporation, is that correct?

A. That's correct.

Q. Was any money advanced to Gilbertville for working capital?

A. He advanced \$5,000 for working capital.

Q. And how was that advanced in cash or how?

A. By cash I assume you mean check?

Q. Yes.

A. Yes, by check.

Q. And was that in addition to the \$35,000?

A. Correct.

Q. And to your knowledge—

Exam. Baumgartner: When you say "in addition to \$35,000," that \$35,000 was to go to Vachon and not to the corporation.

[fol. 371] Mr. Barrett: That's right.

Exam. Baumgartner: Now Mr. Nelson puts \$5,000 into Gilbertville as working capital?

Mr. Barrett: That's correct.

Exam. Baumgartner: That wouldn't be in addition to the \$35,000.

Mr. Barrett: I was referring to a payment from Mr. Nelson to get into this business.

By Mr. Barrett:

Q. Now do you know what the source of that \$5,000 that Mr. Nelson put into Gilbertville Trucking was? Was it a loan?

A. Yes.

Q. And from whom was it borrowed?

A. It's part of this loan that was read earlier from the First National Bank of Manchester. May I explain it clearer and you'll probably follow it. He borrows from the First National Bank of Manchester \$30,000; he gives Mr. Vachon a loan of \$10,000; that's forty in all. All he had to pay for the stock was thirty-five and that's how we get that \$5,000 that went in as working capital.

Q. Now, while we are on that subject, if I recall correctly in reading that letter from the bank, within a few weeks after that loan was made \$15,000 was repaid.

A. Correct.

Q. Will you explain that?

[fol. 372] A. Yes. I believe that's in the agreement that was shown here this morning. Only \$10,000 was required. I guess you'd call it a binder; originally. The other sum went into the escrow agents. Now on March 2, 1953 when Kenneth Nelson borrowed and Oscar Chilberg borrowed \$30,000 from the bank, on the third of March he had to pay \$10,000 as I believe it states in the agreement. However, he had \$30,000 on hand. He placed \$5,000 as working capital and the other \$15,000 he repaid the loan, just temporarily. And it states further in that letter that on a date in April he then reborrowed—on April 30 he went again to the bank and secured the additional \$15,000 that he had repaid to the bank on March 5. It's still \$30,000. He needed that for the escrow agents.

Q. And that original loan from that bank is still outstanding in some amount as of the present time?

A. Correct.

Q. And there was no monies other than that which you have just told us about that were used by Kenneth Nelson or Oscar Chilberg to finance the purchase of the Gilbertville stock?

A. No other money, that's correct.

Q. Now, that was in March and April of 1953, right?

A. Right.

Q. Was Oscar Chilberg during that period still owner of that garage in Philadelphia?

A. Yes, he was.

[fol. 373] Q. And during that time did that garage do work for the L. Nelson & Sons Corporation?

A. Yes, that's correct.

Q. You stated that early in 1954 you advised Kenneth Nelson to seek a merger with L. Nelson & Sons, do you recall that?

A. That's correct.

Q. Will you tell us just what your advice to Mr. Kenneth Nelson was?

A. Yes, to try to establish some credit, not pay high finance rates on each time he'd buy equipment on chattel mortgage and, therefore, reduce his interest charges, and he continuously was financing himself backward in payments of obligations to creditors. He also desired to expand further.

Q. Now you stated what his conditions were. Now, will you tell us what advice you gave him?

A. I spoke to him and told him first to see Miss Kelley to find out if a merger were possible as far as legal and as far as ICC regulations go.

Q. And did you tell him when he talked to Miss Kelley regarding this merger to refer to any other transportation company with which he should consider merging?

A. I did, yes.

Q. What was the name of that company?

A. Nelson's.

Q. Did you suggest that he merge with any other carrier [fol. 374] other than Nelson?

A. No, I did not.

Q. At the time you gave him this advice, did you know whether from your accounting relationship with L. Nelson,

did you know whether the Nelson Company was susceptible to a merger deal?

A. I do know.

Q. Did you know at that time?

A. I did know, yes.

Q. What did you know as far as that is concerned?

A. Yes, that it was very apparent the Nelsons, Charles Chilberg and Clifford Nelson were more interested in a southerly route to expand down south at that time.

Miss Kelley: I'm sorry; I don't understand the answer.

Exam. Baumgartner: Miss Reporter, will you please read the question.

(Question and answer read.)

Miss Kelley: I think we need the question and answer before that.

Exam. Baumgartner: I think we'll have to go back a little bit further.

(Record read.)

Exam. Baumgartner: I think that clears it up.

By Mr. Barrett:

Q. Does that complete your answer, Mr. Solomon?

A. That completed my answer, yes, sir.

[foi. 375] Q. Now, specifically I'm asking you, did you know whether or not when you sent Mr. Kenneth Nelson to see Miss Kelley, whether or not the L. Nelson & Company was susceptible to a merger deal as far as Gilbertville Trucking?

A. I did not know.

Q. And I take it that probably Kenneth Nelson came back and said that the deal could be worked out, is that correct?

A. That's substantially correct.

Q. And then in April of 1954 you stated you went to Mr. Charles Chilberg?

A. Correct.

Q. And up until this time Mr. Charles Chilberg did not know the proposition you advanced to Kenneth Nelson?

A. As far as I'm concerned, I'd definitely tell you he didn't know. As far as I'm concerned that is. He may have

spoken to his brother in the meantime. I wouldn't know about that, sir.

Q. Did anything come to your attention which indicated that Charles Chilberg did know about this proposition?

A. No, nothing did.

Q. Did you ever see Mr. Chilberg in the interim?

A. I certainly did.

Q. Now, in April of 1954 then you did talk to Mr. Charles Chilberg?

A. Correct.

Q. And did you give him some advice?

[fol. 376] A. I did.

Q. And did he seek some advice from you in relation to a merger with Gilbertville?

A. Right.

Q. Will you tell us what advice he sought from you and what advice you gave him?

A. Yes. I mentioned to him that the duplication, all the duplication that's occurring there could be avoided by a merger, and I myself spoke of some of the economies that could be accomplished if there were a merger.

Q. And that's the advice you gave him?

A. Yes, sir.

Q. And what did he say to you or reply to you?

A. He said to me that he was going to look into it.

Q. And—

A. And he too then asked Miss Kelley's advice about it.

Q. And do you know when it was in relation to April of 1954 that it was decided that Mr. Charles Chilberg on behalf of Nelson would go into this merger deal with Gilbertville?

A. The question is when?

Q. Yes, after this conference in April of 1954.

A. I know there was a time elapse there and it was not until January of 1955 to my knowledge that there was a conference between Charles Chilberg, Clifford Nelson, Miss Kelley, and myself took place.

[fol. 377] Q. That is as far as you know?

A. That is correct.

Q. But you don't know whether or not, in the interim

Mr. Chilberg and Kenneth Nelson, who are related, said, "All right, we'll go ahead with this"?

A. No, I do not.

Q. Now subsequent to that time in April of 1954, did not the financial structure of Gilbertville greatly increase or better itself? You can refer to the income statements in the application and Exhibit 7.

A. Yes, sir. The application Exhibit 7?

Q. And Exhibit 7. It's Exhibits B-6 particularly and 7. Well, specifically referring to the application, Exhibit B-6 (2)—

Exam. Baumgartner: B-6(1)?

Mr. Barrett: B-6(2).

By Mr. Barrett:

Q. The operating statement of Gilbertville for the year ending 1954.

A. Yes.

Q. The operating revenue was One hundred seventeen odd thousand dollars?

A. Correct.

Q. For the first five months of 1955 as reflected by Exhibit B-6(1) it had greatly exceeded that one hundred fifty-one odd thousand dollars, correct?

A. Correct.

[fol. 378] Q. And as 1955 progressed, correspondingly the revenue was that much greater?

A. If you recall, during 1955 there was a prolonged strike of approximately six weeks in the trucking industry in that area.

Q. That was in the summer of 1955?

A. Correct, sir.

Q. But as of January and the first part of 1955 Gilbertville was bettering itself, correct?

A. It was bettering itself. However, I notice that in speaking of Exhibit B-6(2) you did not mention that the corporation incurred a \$2499 loss. You're speaking about revenue only, but you didn't say that the net result was a loss.

Q. Well, all right. The exhibit is in the application. It's in the proceeding. I'm just referring to the one figure for the purpose of my question.

A. Yes, sir.

Q. And correspondingly as of May 31, 1955, the balance sheet of Gilbertville had greatly improved, is that correct? Just as an over-all picture.

A. It is, but the current assets, you see, do not increase very much, if any. In fact, the current assets on May 31 is \$72,660. The current liabilities excluding any of the notes payable, and if we took into account the sums due on the equipment within one year, he has a deficit in working capital.

[fol. 379] Q. All right. For the moment forgetting all the notes payment, and the equipment was secured by a chattel mortgage I presume?

A. That's correct.

Q. So, excluding the equipment as far as the current assets and current liabilities are concerned, there was roughly a ratio of one to one, is that correct?

A. No.

Q. Forgetting the equipment.

A. Forgetting the equipment, there is a ratio of one to one, right, sir.

Exam. Baumgartner: Mr. Barrett, may I inquire about how much longer you'll be? I'm asking that with reference to adjournment for lunch.

Mr. Barrett: Well, I think that I'll probably be three-quarters of an hour.

Exam. Baumgartner: Well, I think, then, we'd better adjourn for lunch until 1:30. Is it convenient for you?

Mr. Barrett: It doesn't inconvenience me at all.

Exam. Baumgartner: All right, then, we'll—

Mr. Barrett. Perhaps if we could finish this one subject.

Exam. Baumgartner: All right. Strike my remark about adjournment.

By Mr. Barrett:

Q. Are we agreed on that, other than the equipment obligation?

[fol. 380] A. One to one.

Q. And from your experience as an accountant in an ordinary corporation, what is a healthy ratio of the current assets against the current liabilities?

A. It varies by industry.

Q. Take a manufacturing industry.

A. A manufacturing industry, 3 and 4 to 1 at least.

Q. And trucking industry? Do you have any experience as to what a normal ratio is?

A. No, I do not, but it's not a healthy condition, it certainly isn't.

* * * * *

[fol. 382] By Mr. Barrett:

Q. Now before that particular question I think we came to a point where, if I'm wrong correct me, that as of the end of 1955 referring to Exhibits 7 and 5, that the financial structure of Gilbertville had improved since 1953 and 1954 generally.

[fol. 383] A. I don't see—you're saying Exhibit 5 which is a balance sheet as of the end of December 31, 1955 and Exhibit 7 I have here is an operating statement from January 1, 1955 to December 31, 1955.

Q. That's right.

A. Is that what you're referring to?

Q. That's right.

A. An operating statement and a balance sheet?

Q. Yes. In other words, the revenue as compared to, we'll say, 1954 was almost four times as much, correct? Or between three or four times as much. To that extent there was an improvement.

A. That is correct.

Q. And generally taking one item from the balance sheet, Exhibit 5, the deficit that existed in Gilbertville in prior years was reduced by another couple of thousand dollars?

A. That is correct.

Q. Generally there was improvement in both income and reduction of the deficit?

A. Just in those two items, but you're not reflecting, for instance, the current position, the working capital position which is short.

Q. All right. As of May 31, 1955, that's Exhibit B-4 in the application, the cash on hand and in banks improved as of the end of 1955, correct?

[fol. 384] A. Correct.

Q. Now, while generally the total current assets decreased because of the decrease in accounts receivable, correspondingly the current liabilities decreased somewhat, isn't that correct?

A. Correct.

Q. The notes payable to officers increased at the end of 1955, correct?

A. Correct.

Q. Now the biggest item we can argue over in the comparison of these two balance sheets is the change in the revenue equipment of Gilbertville between those two periods, isn't that correct?

A. No.

Q. Isn't that one of the biggest items?

A. No, it is not.

Q. What's the biggest?

A. On May 31, 1955 excluding any installment payments due within one year Gilbertville Trucking Company had a working capital of \$2,005.83.

Q. As of what date?

A. May 31, 1955, working capital of \$2,005.83. As of December 31, 1955, and again excluding working capital or the taxes that it owed, it had a deficit in working capital of \$5,342.

Q. Where does that deficit come from?

[fol. 385] A. What's that?

Q. What makes up the principal amount of that deficit?

A. Your cash and receivables as of the end of December is less than what they owed to creditors.

Q. Well, Mr. Solomon, we are not going to pursue this much further because actually there's only two balance sheets we are referring to which are within the same year, the two we are referring to.

A. Yes.

Q. So comparison isn't very well taken, isn't that correct? I mean you can make comparisons but it would be better for two different periods rather than one year.

A. Suit yourself. I have nothing to say about that.

Q. Did you ever change your advice to Gilbertville about this merger subsequent to the first time you gave it?

A. I don't recall ever changing my advice, no.

Q. And do I understand from your testimony that you consider yourself the motivating factor in suggesting this merger of Nelson and Gilbertville?

A. Well, I initiated it.

Q. Now, I don't know but I might have asked this, I'm not positive. Did you ever advise Kenneth Nelson to look for merger with any other carriers other than Nelson?

Miss Kelley: You did ask that before.

The witness: You did ask that.

{fol. 386]

By Mr. Barrett:

Q. You stated that as far as you know there was a meeting between members of the Nelson family, yourself, and Miss Kelley in January of 1955 relative to this proposed transaction, is that correct?

A. That's right.

Q. Do you have any knowledge when the application that's been filed with this Commission was signed? If I refresh your recollection, it's sometime in August of 1955?

A. That is correct. I was present at that time.

Q. And it was not filed until sometime in October of 1955?

A. I do not know what date it was filed.

Q. If the docket here reflects October of 1955, will you accept that?

A. Yes, sir.

Q. Now, as far as your own knowledge is concerned, do you know what, if any, reason there was for delay in filing the application from the 1st of 1955 to October, from your own knowledge?

A. I do not know why.

Miss Kelley: If it's of any importance, Mr. Examiner, I can explain it.

Mr. Barrett: I'm asking the witness of his own knowledge.

The Witness: I don't know.

By Mr. Barrett:

Q. Now, during this period in April of 1954 and shortly thereafter, do you know whether or not Clifford Nelson and [fol. 387] Charles Chilberg were anticipating and negotiating for the acquisition of another carrier?

A. In April, starting with April of 1954?

Q. Yes.

A. It was either April or May of 1954, I did know, yes.

Q. And they were negotiating for the acquisition of another carrier?

A. Correct.

Q. And is that R. A. Byrnes, Incorporated?

A. Correct.

Q. And that proceeding was before the Commission?

A. That's correct.

Q. And you testified in it?

A. That's correct.

Q. I might point out that was MCF 5749. And did you give advice to Charles Chilberg and Clifford Nelson relative to that acquisition?

A. I did.

Q. For the purpose of pinpointing that particular transaction, if I told you that the contract was dated June 4, 1954 and the application was filed with the Commission on July 14, 1954, will you accept that as being the approximate dates?

A. Yes.

Q. And prior to signing that contract you stated there were negotiations going on between Mr. Chilberg and Mr. [fol. 388] Clifford Nelson who acquired that Byrnes operation sometime in April or May of 1954?

A. Excuse me, would you restate that, please.

Q. I think you have just stated that negotiations were going on between Mr. Chilberg and Mr. Clifford Nelson who acquired that Byrnes operation sometime in April or May of 1954?

A. Correct.

Q. Now, did you have anything to do in your capacity with the acquisition by Gilbertville of the Louis Marmer certificate, that is, Wolff's Express?

A. No, I did not.

Q. And did you prepare any of the financial data that was submitted by them?

A. Any that was prepared must have come from me.

Q. Did you give any advice to Gilbertville relative to that transaction?

A. I did not.

Q. Did you know about it? Did you know that they were acquiring it?

A. I was told, yes.

Q. And for the purposes of fixing the date on that, if I told you that the applications were signed as of the date of April 28, 1954 and was mailed to the Commission on May 14, 1954 would you accept that as the approximate time?

A. Yes.

[fol. 394]

By Mr. Barrett:

Q. Now you heard counsel state that the Byrnes acquisition had been consummated as of August?

A. August 21, 1956 is the correct date. I think you have it [fol. 395] down as the 22nd of August.

[fol. 397] Exam. Baumgartner: Well, it's simple enough to say, did L. Nelson & Sons Company advance any funds for the acquisition of the R. A. Byrnes rights or business.

By Mr. Barrett:

Q. Can you answer that question, Mr. Solomon?

A. The L. Nelson & Sons did not take any loans from a bank in order to finance the purchase.

Exam. Baumgartner: That isn't the question I asked. The question I asked was did L. Nelson & Sons advance any funds to anybody for the acquisition of the R. A. Byrnes Corporation?

The Witness: No, they did not advance any funds.

By Mr. Barrett:

Q. Did any member of the Nelson Family?

Miss Kelley: Well, Mr. Examiner, the two members of the Nelson Family—

By Mr. Barrett:

Q. Other than Charles Chilberg and Nelson.

A. Any member of the family?

Q. Yes.

A. No member of the family.

Q. Did the Bergson Corporation?

A. No, sir.

Q. Now, in connection with any loans that were taken to [fol. 398] finance the Byrnes transaction, did any person in the Nelson family other than Charles Chilberg and Clifford Nelson, or did the Bergson Corporation or L. Nelson & Sons endorse or guarantee any notes to your knowledge?

A. To my knowledge they didn't endorse any notes.

Q. You do the accounting work for Byrnes?

A. I do, and I made a mistake this morning when I said it's two carriers. I now say it's three carriers I have experience with, those three being Gilbertville, Nelson, and Byrnes. This morning I testified there were two.

Q. Well, when I asked you that question I was assuming that one also.

A. Yes, sir.

Q. Where is the Byrnes headquarters just for the record at the present time?

A. 25 West Road, Ellington, Connecticut.

Q. That's where Nelson and Gilbertville terminal is, in that city?

A. That's right, sir.

Exam. Baumgartner: But not in the same building?

The Witness: The office is in the same building, yes, sir.

Exam. Baumgartner: With L. Nelson?

The Witness: With L. Nelson on the first floor, yes, sir.

By Mr. Barrett:

Q. And to shorten this up, does Byrnes occupy the same terminal facility in New York City that Gilbertville and [fol. 399] Nelson do?

A. That is correct, sir.

Q. And whatever other terminals Byrnes might have, is the only common one between them and Gilbertville in New York City to your knowledge?

A. No, I believe there are other terminals that are common for three carriers.

Exam. Baumgartner: Common to what?

Miss Kelley: Mr. Examiner, may I first inquire, will you permit me to inquire of Mr. Solomon, I doubt that he understands the operating authorities of these companies.

Exam. Baumgartner: What?

Miss Kelley: I doubt if he understands the limits of these companies.

Mr. Barrett: I didn't ask him the operating authorities. I just asked him is that the only point where Gilbertville and Byrnes share a common terminal.

Exam. Baumgartner: Gilbertville and Byrnes?

Mr. Barrett: That's right.

The Witness: I do not know.

Exam. Baumgartner: You want to change your answer then? You said a moment ago there were some other places where they had common terminals.

The Witness: That's right.

Exam. Baumgartner: You want to change it now and say [fol. 400] you don't know?

The Witness: I do not know.

By Mr. Barrett:

Q. Now, do you know anything specifically about the different operations of the three carriers, Byrnes, Nelson and Gilbertville as far as relate to how they use the common facilities that they share like terminals?

A. I do not know.

[fol. 402] By Mr. Barrett:

Q. To clear this up, you testified as far as this subject matter is concerned, as far as you know, Byrnes shares common facilities with Gilbertville and Nelson in a terminal in New York City?

A. That's right.

Q. And in Ellington, Connecticut, Byrnes offices are in Nelson's headquarters?

A. That is correct.

Mr. Barrett: Does that clarify it?

Miss Kelley: That clarifies it.

Exam. Baumgartner: What do you mean by Nelson's headquarters? You mean same building or physically in the same office space?

The Witness: In the same building. It's separate space for Byrnes employees.

Exam. Baumgartner: All right.

Mr. Keenan: Mr. Examiner, out of order could I inquire whether that space is on Gilbertville's floor or Nelson's floor.

The Witness: The first floor, I said, Nelson's floor.

[fol. 408] The Witness: As of July 31, 1956 equipment operated, owned and operated by Gilbertville, 35 units.

Exam. Baumgartner: Did you say owned and operated?

The Witness: Owned and operated.

By Mr. Barrett:

Q. Wait a minute, now, Mr. Solomon. You say owned and operated. I'm asking you specifically as to owned at the moment.

A. Owned?

Q. Yes.

A. 35 units.

[fol. 409] Q. Do you note the two items transportation and terminal?

A. Yes, sir.

Q. Could you give us any explanation as to why the [fol. 410] terminal expense exceeds the transportation expense?

Exam. Baumgartner: What was that, Mr. Barrett?

Mr. Barrett: Pardon me. I asked him if he could give us any explanation as to why the terminal expense exceeded the transportation expense.

Exam. Baumgartner: Thank you.

The Witness: Looking at it here, I would say it appears to me that the bookkeeper may have been charging terminal wages that are actually drivers wages. Drivers wages are under transportation, whereas terminal wages belong under terminals.

Exam. Baumgartner: Would that be true of pick-up and delivery drivers if there are any?

The Witness: Pick-up and delivery drivers should be under terminal wages, but the amount here, for instance, New York terminal wages is one hundred, close to \$117,000 and it must be, I know there are drivers that go from New York.

Exam. Baumgartner: Over-the-road drivers?

The Witness: That's right, sir.

By Mr. Barrett:

Q. Will you refer to Exhibit No. 4 for a moment?

A. Yes, sir.

Q. Referring to the same two items in L. Nelson operating statement, the terminal expense is a small part as against the transportation expense, \$25,000 as against \$276,000.

A. That's correct.

[fol. 411] Q. And normally, doesn't the transportation expense exceed the terminal expense in a line-haul carrier?

A. It does exceed it, yes.

Exam. Baumgartner: He said normally.

The Witness: Normally, yes.

By Mr. Barrett:

Q. With that in mind, can you tell us how much of an error is contained in the two items in the Exhibit No. 8 in the transportation and terminal items?

A. No, I could not.

Q. However, you used those two items as they stand on Exhibit 8 to make your computation as far as Exhibit No. 11 is concerned?

A. Correct.

Q. Referring to Exhibit 8 again, you have operating taxes and licenses in an amount of twenty-seven odd thousand dollars, correct?

A. On Exhibit No. 8?

Q. Yes, the item operating taxes and licenses.

A. Exhibit No. 8, operating taxes and licenses, yes, sir.

Q. And on Exhibit 4, the same item for Nelson is \$49,000 correct, in round figures?

A. Yes, sir.

Q. Could you tell us why, if there is any explanation within your knowledge, why proportionately for the number of which you state was 35, that figure is comparatively high [fol. 412] when you consider Nelson operates well in excess of twice as many vehicles?

A. I could not answer that.

Q. And as far as your general knowledge is concerned, Nelson operates in several more states than does Gilbertville, isn't that correct? It's authority is broader territorially than Gilbertville's?

A. Nelson's is broader, yes.

Exam. Baumgartner: Authority is broader?

The Witness: I don't know anything about authority; I'm merely stating the territory probably covered.

Exam. Baumgartner: And what's actually operated?

The Witness: That's right, sir.

By Mr. Barrett:

Q. Now, referring back to Exhibit No. 8 again, of the transportation expenses shown there of \$115,000 how much of that is purchased transportation?

A. Of Gilbertville?

Q. Yes.

A. I stated that yesterday, that it was—

Miss Kelley: I believe that figure is clearly in the record.

The Witness: It was given yesterday exactly. It is approximately \$7,000.

By Mr. Barrett:

Q. And how much of that \$7,000 was or is purchased from Nelson, if you know?

A. Most of it would be from Nelson.

[fol. 413] Q. And just for the record what do you mean by the term, "most of it," over 75 per cent of it?

A. In excess of 75 per cent, yes. I could give you that answer now, \$7,065.03.

Q. And in Exhibit No. 6 in your Accounts Receivable on Gilbertville for July 31, 1956, do you know how much, if any, of that is due from the Nelson Corporation?

A. At the end of July, 1956, none of that would be from Gilbertville.

Miss Kelley: Did you refer to Exhibit 6?

Exam. Baumgartner: You mean none of it from Nelson?

The Witness: Thank you. We are looking now on the Gilbertville balance sheet, Accounts Receivable, customers, none of the \$56,657 would be due from Nelson.

Q. Referring to the Exhibit No. 2, the balance sheet of Nelson for the same period, on Accounts Receivable customers of \$72,000 in round figures, how much of that, if any, is due from Gilbertville?

A. Yes, sir. The sum due from Gilbertville to Nelson that's included in Nelson's accounts receivable as of July 31, 1956 is \$9,621.89.

Q. Where there's a vehicle leased, for example, from Nelson by Gilbertville, do you know whose driver is on the vehicle or who pays the driver from your records?

A. Yes, I do.

[fol. 414] Q. Will you tell us?

A. Yes. The vehicles are leased by Nelson to Gilbertville without any drivers.

Q. Do you know from your records approximately how many vehicles per week or per day Gilbertville does lease from Nelson?

A. No, I do not.

[fol. 415] Exam. Baumgartner: The question is do they use the same telephone at the Boston terminal.

By Mr. Barrett:

Q. If you know.

A. I do not know.

Q. If they did, do you know who is paying for it?

Miss Kelley: Well, now, I object.

Exam. Baumgartner: I think that's rather speculative.

By Mr. Barrett:

Q. Do your records reflect any telephone expenses of Gilbertville?

A. Sure.

Q. And do they reflect telephone expenses of Nelson?

A. Yes.

[fol. 416] Q. And was telephone expenses one of the items carried into Exhibit No. 11 for proposed savings?

A. No, it is not.

Q. As far as dispatchers are concerned in the common terminals of Nelson and Gilbertville, if you know, do you know whether common dispatchers are used?

A. I don't know that.

Q. And is that one of the items that was taken into Exhibit 11 to effect savings?

A. No dispatchers are taken into consideration on savings.

Q. I think you told us who Gilbertville bought its equipment from. Do you know whether or not the equipment is bought from the same manufacturer, specifically International, by both companies?

A. If you're referring to my testimony of yesterday, in looking it up last night, I found I did make a—I made a statement—

Miss Kelley: Mr. Solomon, I don't think you're answering his question.

The Witness: If the purchase from the manufacturer, did you say—

By Mr. Barrett:

Q. From the same manufacturer. In other words, does Nelson purchase International equipment?

A. Yes.

Q: Did you testify yesterday that's where Gilbertville [fol. 417] purchased also?

A. From International also, yes.

Q. Now, when Kenneth Nelson disposed of his stock in L. Nelson & Sons, I think you said September of '51, could you tell us what equity or interest he had in L. Nelson dollar-wise?

Miss Kelley: I don't quite follow on that.

Exam. Baumgartner: As of what time, Mr. Barrett?

Mr. Barrett: As of the time he disposed of his L. Nelson stock.

Exam. Baumgartner: Do you understand the question? [fol. 418] The Witness: I believe that was given yesterday in detail. This is a long question now, Mr. Barrett. He sold 50 shares. All together in the Nelson Corporation there was 500 shares. 300 was held as of September of 1951 by the—

Exam. Baumgartner: I think, Mr. Solomon, you could make this answer comparatively short if you will direct your answer squarely to the question that was asked. What financial—

Mr. Barrett:—interest or equity—

Exam. Baumgartner:—was—when we use the term "equity," that excludes loaned money, what equity did Kenneth Nelson have in L. Nelson & Sons just prior to his disposition?

The Witness: He had a 10 per cent interest.

Exam. Baumgartner: About 10 per cent?

The Witness: Exactly 10 per cent.

By Mr. Barrett:

Q. Now 10 per cent on approximately how ~~many~~ dollars in round figures? 10 per cent of what?

A. As of September 31, September of 1951?

Q. Yes.

A. I'll give you that answer.

* Exam. Baumgartner: That would depend on the market value of the shares, wouldn't it?

Mr. Barrett: I don't know what Mr. Solomon is going to give me.

The Witness: The figures that I will be basing it on will be the book value.

[fol. 419] Exam. Baumgartner: Book value?

The Witness: Yes, sir. As of September 30, 1951, book value of \$82,000. Nelson had a book value of \$82,684.

By Mr. Barrett:

Q. Or transcribed, 10 per cent of that Kenneth Nelson would be \$8,268 in round figures?

A. That's correct.

Q. And if that transaction would have been consummated as of July 31, 1956, referring to Exhibit No. 9, is it true that his interest in Nelson, if I read the exhibit correctly, will be \$24,500 odd dollars?

A. That is correct.

Q. Do you know when Kenneth Nelson first began to negotiate or bargain for this Gilbertville stock?

A. When—as I understand the last question—

Q. Was that last answer all right?

A. Yes. Did you state when did Kenneth Nelson begin to negotiate for Gilbertville stock?

Q. Yes, do you know?

A. Yes.

Q. Approximately what time.

A. Yes, in January or February of 1953. The exact date would be, as far as I know and I have testified before, January 19, 1953.

Q. As far as your relationship with the two corporations and the principals involved in them, did you ever have any

[fol. 420] discussions about L. Nelson & Sons directly taking over Gilbertville? That is, at the time that Kenneth Nelson was negotiating for the stock.

A. Oh, no, no.

Q. Now, do any of the Nelson Family receive income from the Bergson Corporation; specifically the Chilbergs and Clifford and Kenneth Nelson, so forth.

A. They did receive income from Bergson, yes, sir.

Q. Did they in the year 1953?

Miss Kelley: I object, Mr. Examiner. What's the materiality of that?

The Witness: No, not in 1953.

Exam. Baumgartner: What was your objection?

Miss Kelley: As to the Bergson Company. I mean I can't see the materiality of whether or not they received any income from it.

Exam. Baumgartner: I take it the conversation you testified as having received was in the form of dividends?

The Witness: No, I never testified, Mr. Examiner, as to any income of Bergson Company. This is the real estate holding corporation. It took place because of the estate.

Exam. Baumgartner: I thought you said they received some stock, didn't you? You mentioned several parties there as having received income from Bergson, didn't you, in your question?

[fol. 421] Mr. Barrett: That's right.

Exam. Baumgartner: And you answered they did, from Bergson.

The Witness: From Bergson.

Miss Kelley: May we have the question and answer read?

Mr. Barrett: I'll ask the question again, Mr. Examiner.

Exam. Baumgartner: Yes.

By Mr. Barrett:

Q. Mr. Solomon, have any of the members of the Nelson Family, and I understand seven of them own shares in the Bergson Corporation, do any of those seven persons receive any income from the Bergson Company?

A. Some of them do.

Q. And which ones do?

A. Prior to the year 1955 Ruth Nyberg, Greta Carlson, and Howard Chilberg.

Q. And for how many years prior to 1955 did that arrangement exist?

A. Since the date the corporation began as of—first became active in January of 1953.

Q. And subsequent to 1953 who received any compensation from Bergson, if anybody?

A. Subsequent to?

Exam. Baumgartner: Who of the seven, you mean?

Mr. Barrett: That's right.

The Witness: Subsequent to?

[fol. 422] By Mr. Barrett:

Q. January 1, 1955.

A. All seven children.

Exam. Baumgartner: That was in the form of dividend payments?

The Witness: Directors' salary.

Exam. Baumgartner: None in the form of dividends?

The Witness: None in dividends, no.

By Mr. Barrett:

Q. And all seven subsequent to January 1 of 1955 received directors' salaries from Bergson?

A. That's right, sir.

Q. And is it all in equal amounts to the seven of them?

A. It is in equal shares, yes, equal payments.

Q. Did you sometime during the course of your testimony give the officers and directors of the Bergson Company, do you recall?

A. I did. I can give it to you very easily right now.

Exam. Baumgartner: Well, unless it's important, let's not go into it now.

Miss Kelley: It's in the record.

Mr. Barrett: If it's in, all right; I just forgot.

By Mr. Barrett:

Q. Now in 1952, you testified that Kenneth Nelson received some fifteen odd thousand dollars from L. Nelson, as you put it, as a free lance tariff consultant?

A. That's correct.

Q. During that year in the same capacity do you know [fol. 423] how much Kenneth Nelson received from others outside of Nelson?

A. Let's see. I gave the figure of \$15,650 Kenneth Nelson received in 1952 as a free lance tariff consultant.

Q. All right.

A. It's the sum total, I think you're getting at.

Q. Of that amount, how much was received from L. Nelson & Sons?

A. From the information I have with me, I could not say just how much of it is.

Exam. Baumgartner: Was any of it?

The Witness: Oh, yes.

Exam. Baumgartner: Received from others?

The Witness: From others.

Exam. Baumgartner: From others than L. Nelson Company?

The Witness: From my records I would not know.

Exam. Baumgartner: I was asking do you know if some was received from carriers other than L. Nelson?

The Witness: I do not know.

By Mr. Barrett:

Q. In that fifteen odd thousand dollars just given us, did that include any income from the Bergson Corporation?

A. No.

Q. From your personal recollections, do you know whether or not a little or a half or a majority of that fifteen odd thousand dollars came from L. Nelson & Sons?

A. Majority.

[fol. 424] Q. Majority?

A. Majority comes from L. Nelson & Sons.

Q. And percentage-wise could you classify a majority by round figures?

Miss Kelley: If you know.

The Witness: I don't know exactly.

By Mr. Barrett:

Q. Well, you mean at least over 50 per cent?

A. Oh, yes.

Exam. Baumgartner: Well, now, wait a minute. You said a moment ago you didn't know whether Mr. Nelson had received a portion of this \$15,000 from others.

The Witness: Yes.

Exam. Baumgartner: You said you didn't know?

The Witness: That's right.

Exam. Baumgartner: Now you say he received only a portion of the \$15,000 from L. Nelson.

Miss Kelley: Well, I understood that's what he said.

Exam. Baumgartner: Isn't there an implication that he received the balance from others?

The Witness: I'm sorry.

Exam. Baumgartner: Maybe I'm confused. I want to be straightened out.

Mr. Mueller: Mr. Examiner, I think my notes clearly show in answer to a question yesterday the witness stated that this \$15,000 came from L. Nelson & Sons Transportation Company.

[fol. 425] Mr. Barrett: That's what I have.

Exam. Baumgartner: That's my recollection, L. Nelson.

Miss Kelley: I'll agree with you people that he said that, but I also recollect at the time he gave the testimony what he had in front of him was the income tax return of Mr. Nelson.

Mr. Barrett: Can't the witness explain? He's competent enough without Miss Kelley guessing at it.

Exam. Baumgartner: Well, have the witness clear this up.

Miss Kelley: I was hoping he'd have the opportunity.

The Witness: I took it from the income tax statement yesterday that Kenneth Nelson did receive \$15,650.

Exam. Baumgartner: From whom?

The Witness: As tariff consultant, and the information

on the tax return does not show from whom, but to give you a concrete answer right now I'd say from Nelson.

Miss Kelley: Do you know for sure?

Exam. Baumgartner: Do you know?

The Witness: Positive.

Miss Kelley: Yes, or are you just—

Exam. Baumgartner: Just a moment. Are you positive that all of it came from L. Nelson Company? Can you say positively all of it, did?

The Witness: Yes.

By Mr. Barrett:

Q. All right, now we come back to my other question. In addition to that fifteen odd thousand dollars, do your [fol. 426] records reflect how much, if any, other income Mr. Kenneth Nelson received for 1952 as a tariff consultant?

Exam. Baumgartner: In what year was that?

Mr. Barrett: 1952.

Miss Kelley: I think that's too remote, Mr. Examiner. I can't see the materiality of it to the issues here.

Exam. Baumgartner: We are going back here four years.

Miss Kelley: At that time he had no connection with Gilbertville.

Exam. Baumgartner: You're asking now how much he received as a tariff consultant in 1952, right?

Mr. Barrett: I'm asking in addition to this fifteen odd thousand dollars that Mr. Solomon just told us was received from L. Nelson, how much if any in addition to that was received by Mr. Kenneth Nelson as a tariff consultant.

Exam. Baumgartner: He just gave us to understand this \$15,000 was all that he received during that year.

By Mr. Barrett:

Q. Is that correct?

A. Yes.

Q. Now, if I asked you the same questions for the year 1953 as to the \$13,800 that you mentioned, how much of that was received from L. Nelson by Mr. Kenneth Nelson for being tariff consultant?

A. All of it.

Exam. Baumgartner: Now, I'm sure the record shows the [fol. 427] answer to this question I'm about to ask, but I'd like to know what the answer is for my own benefit. Were these payments received prior to his connection with Gilbertville as a stockholder?

The Witness: Of course the payments in 1952 were prior to his becoming the stockholder; the payments in 1953, part of that would have to be after he became a stockholder of Gilbertville.

Exam. Baumgartner: Were any of the services for which he received that \$15,000 performed for Nelson after he became a stockholder in Gilbertville?

The Witness: First he became stockholder in Gilbertville in March 1st of 1953. The \$15,000 he received is in 1952.

Exam. Baumgartner: Oh, he received that for services rendered in 1952?

The Witness: Yes, sir.

Mr. Keenan: \$13,800 is the amount of 1953?

Exam. Baumgartner: \$13,800 is the amount in 1953?

The Witness: Right, sir.

Exam. Baumgartner: And was that received for services performed prior to his acquisition of Gilbertville stock?

The Witness: Some of that would have to be after.

Exam. Baumgartner: Afterward?

The Witness: Yes, sir.

By Mr. Barrett:

Q. Now, my last question, Mr. Solomon, it's more or less [fol. 428] a two-barrel one. If it takes a little time to give us the answers, maybe the Examiner will give us a recess.

Exam. Baumgartner: What's your question? You put your question to the witness.

By Mr. Barrett:

Q. For the years 1953, 1954 and 1955, will you give us total amounts paid to the Bergson Corporation respectively by L. Nelson and by Gilbertville, if you have that information available?

A. I will answer your last part of that question first. The testimony does state in each instance where Gilbertville rents any space they pay it directly to Nelson. That takes care of the second part of your question, correct?

Q. Right.

Miss Kelley: May I understand what they mean by the other part of the question. You're referring to the rents that are paid by L. Nelson to the Bergson Company?

Mr. Barrett: May I ask permission to amend my question?

Exam. Baumgartner: Surely.

By Mr. Barrett:

Q. Mr. Solomon, will you give us in view of your response, the total amount paid to the Bergson Corporation by Nelson for the years of 1953, 1954, 1955 and for the same years the total amount paid by Gilbertville to Nelson for its share of the rents, if any.

[fol. 430] The Witness: Yes, sir. The amount Nelson pays Gilbertville is \$8,100 per year. Nelson pays Bergson Corporation—I'm sorry—\$8,100 per year. I testified earlier they do pay \$675 per month to Bergson Company.

Miss Kelley: Mr. Examiner, is it all right if I ask him to explain how he arrived at the figures, if he had the figures or if he arrived at it by computation, just to clear it up.

Exam. Baumgartner: Now the record shows at Ellington Nelson pays Bergson \$675 a month rental?

The Witness: Yes, sir.

Exam. Baumgartner: Of which Gilbertville pays Nelson \$100 a month?

The Witness: Right, sir.

Exam. Baumgartner: That at Newton Nelson pays Bergson a rental of \$100 a month?

The Witness: Right, sir.

[fol. 431] Exam. Baumgartner: Of which \$100 is paid by Gilbertville to Nelson. That at Woonsocket, Nelson pays Bergson \$100 a month, of which Gilbertville pays \$100 a month to Nelson.

The Witness: Right.

Exam. Baumgartner: Now, that's the sum total of the payments from Nelson to Bergson?

The Witness: That's right, sir.

Exam. Baumgartner: And the sum total of the payment from Gilbertville to Nelson?

The Witness: Correct.

Exam. Baumgartner: And does Gilbertville pay Bergson anything directly?

The Witness: No, they do not. Gilbertville does not pay anything directly to Bergson Corporation.

Exam. Baumgartner: Does that answer your question?

Miss Kelley: Just one thing, Mr. Examiner, for clarification. I believe in Mr. Solomon's figure there is another terminal which is not shared with Gilbertville and that you have overlooked in your computation.

Exam. Baumgartner: That Nelson rents from Bergson?

Miss Kelley: Newton, Woonsocket, and Ellington you mentioned. At Newton Nelson pays Bergson \$100 a month; Woonsocket, Nelson pays Bergson \$100 a month, and at Ellington Nelson pays Bergson \$275 a month. That is a total of \$475 a month. I recollect that Mr. Solomon's figure [fol. 432] was \$675 a month, so that I want to call your attention to the fact that there is a fourth terminal involved in the figure that he has just given.

Exam. Baumgartner: Is that correct?

The Witness: That's correct, sir.

Exam. Baumgartner: Where is this other terminal?

The Witness: Philadelphia, \$200 a month.

Exam. Baumgartner: Does that constitute everything that Nelson pays to Bergson?

The Witness: Yes.

Exam. Baumgartner: That's the sum total?

The Witness: Yes, sir.

Exam. Baumgartner: All right.

By Mr. Barrett:

Q. So after that discussion I take it \$8100 for the three years was paid by Nelson to Bergson?

A. That's right.

Q. And I missed the Examiner's computation and I'm sorry, but for the same period how much has Gilbertville paid to Nelson?

A. Yes. In 1953—

Exam. Baumgartner: Let's put it in terms of monthly payments. That's what I was talking about.

The Witness: Monthly?

Exam. Baumgartner: Yes. I think the record shows \$300 a month.

The Witness: \$300 since January 1st of 1956.

Exam. Baumgartner: That's right, \$300 a month from [fol. 433] Gilbertville to Nelson.

Mr. Keenan: Mr. Examiner, the witness was going to testify about 1953 though.

Mr. Barrett: This is what I'm asking him, for the year 1953, 1954 and 1955 the totals for the year that Gilbertville paid to Nelson.

Miss Kelley: If he gives them monthly for each period, isn't it the same thing?

Exam. Baumgartner: If it's easier to give it monthly; if it's easier per annum, do that.

The Witness: 1953, \$1200 Bergson paid Nelson for the rental of terminals—

Exam. Baumgartner: Wait a minute.

Miss Kelley: Wait a minute.

The Witness: Bergson paid Nelson for the rental of the terminals. In 1954, \$1200 per year, and in 1955, \$1200 per year. Beginning in 1956 it's \$300 per month. There's a—as the volume increased, the rental went up.

Exam. Baumgartner: That was all covered yesterday?

The Witness: Yes.

[fol. 434] Redirect examination.

By Miss Kelley:

Q. Thank you. I'm sorry, but I'm in doubt as to whether Mr. Barrett covered these first two questions I have. I shall ask them and we can decide then. Did Oscar Chilberg in-

[fol. 435] vest any money in the Gilbertville Trucking Company?

A. He did not invest any money in the Gilbertville Trucking Company.

Q. Was Oscar Chilberg active in the negotiations which resulted in Kenneth Nelson purchasing the stock?

A. None at all.

Q. Now he was Treasurer of Gilbertville Trucking Company, I believe, for that first year?

A. That is correct.

Exam. Baumgartner: What first year?

Miss Kelley: The first year from March of 1953 to March or April of 1954, I believe.

The Witness: That's correct.

By Miss Kelley:

Q. Now during that period, Mr. Solomon, do you know whether he was active at all as Treasurer or drawing checks or anything of that type for Gilbertville Trucking Company?

A. He did not draw checks or do anything as far as Gilbertville Trucking Company goes.

Q. Now, insofar as Oscar Chilberg is concerned, do you know of any connection that he has with Gilbertville Trucking Company other than he used his name at the bank that you testified this morning and then his name was on the note, the \$10,000 note for Mr. Vachon that was paid?

A. That's his only connection with the Gilbertville Trucking Corporation.

Mr. Keenan: Mr. Examiner, I refrained from objecting to that question. However, may counsel be instructed not to ask leading questions?

Miss Kelley: I will try not to, but I'm just trying to get it over with.

Exam. Baumgartner: I think in the interest of speeding this up, maybe these questions could be a little bit leading, but I'd prefer if they weren't leading, Miss Kelley.

Miss Kelley: All right. I shall try and refrain from it.

By Miss Kelley:

Q. Did you cover whether or not Oscar Chilberg received any compensation of any kind from Gilbertville Trucking?

A. I did. I stated he never received anything. Oscar Chilberg never received anything from Gilbertville Trucking Company.

Q. Now, without referring to your files can you tell me, and this is only in the interest of saving time, the letters that you have referred to in your testimony that were sent to you by attorneys and various persons in connection with negotiations for Gilbertville Trucking Company, do they mention the names of any person other than Mr. Kenneth Nelson?

A. The various letters I received from attorneys and accountant and the insurance agent only mentioned Kenneth Nelson's name. They never mentioned anyone else's name. I have those on hand.

[fol. 438] By Miss Kelley:

Q. Mr. Solomon, there has been some discussion in cross-examination with respect to credit of Gilbertville Trucking Company, and you were asked to read into the record a letter from the First National Bank of Manchester, Connecticut. Is that the bank with which Gilbertville Trucking Company does its banking business?

A. That's correct.

Q. Now, does the Nelson Company do its banking business with the same bank or a different bank?

Mr. Keenan: Objection; it's immaterial, remote and has no probative value.

Exam. Baumgartner: I think it's as pertinent as a good many questions as were asked on cross-examination. The witness may answer.

The Witness: The Nelsons used the Connecticut Trust Company, whereas Gilbertville—

Exam. Baumgartner: You were just asked one question, Mr. Solomon.

The Witness: I'm sorry.

Exam. Baumgartner: Whether or not Nelson Trucking Company did business with the same bank.

The Witness: Nelson does not do business with the same bank.

Exam. Baumgartner: Thank you.

[fol. 439] By Miss Kelley:

Q. Now, Mr. Mueller, I believe, on cross-examination questioned you with respect to the building at Ellington, Connecticut. Do you recall that testimony?

A. Yes.

Q. And I believe that the record is clear that Nelson occupies the first floor of the building as an office and the Gilbertville occupies the second floor of the office.

A. Correct.

Exam. Baumgartner: And Byrnes occupies a portion of the first floor.

Miss Kelley: With Nelson.

By Miss Kelley:

Q. Now, Mr. Solomon, if a person were calling at that place to go to the office of the Gilbertville Trucking Company, when they go in the door how far do they go into the office before they mount the stairs to go up to the second floor?

Exam. Baumgartner: Oh, I think, Miss Kelley, that's getting—

Miss Kelley: Mr. Mueller made quite a point of it, Mr. Examiner, and I think I am entitled to clear it on this record.

Exam. Baumgartner: I don't think it's material.

[fol. 440] By Miss Kelley:

Q. Mr. Solomon, in your accounting practice do you have a number of different accounts?

A. I do.

Q. And do they represent diversified business?

A. They do.

Q. Does the type of advice and service which you render for the L. Nelson & Sons Company, having in mind the difference possibly of the nature of the business, differ in any way from the type of advice or service that you render for any of your clients?

A. No difference.

Q. If I ask you the same question with respect to the [fol. 441] Gilbertville Trucking Company?

A. It would be the same answer.

Q. Do you render bills for your services to the Nelson Transportation Company?

A. I do.

Q. And do you render bills to the Gilbertville Trucking Company?

A. Yes.

Q. And are they separate and distinct bills?

A. Yes.

Q. Does the Bergson Company own property other than that that is rented to L. Nelson & Sons as terminal property?

A. Bergson does own other properties than what it does rent to Nelson.

Q. And are those other properties rent-producing properties?

A. They are rent-producing properties, correct.

Q. Now, with the exception of the income from Nelson and income from the other rent-producing properties, does Bergson receive any other income—strike that.

Is the rent income the only sources of income to the Bergson Company?

A. Correct.

Q. Now, are any of the tenants of the Bergson Company a motor carrier other than L. Nelson—any of their other properties motor carrier properties?

[fol. 442] Mr. Keenan: I didn't understand the question. Perhaps counsel will rephrase it.

Exam. Baumgartner: Will you repeat the question?

Miss Kelley: I will repeat and rephrase it.

By Miss Kelley:

Q. Is the L. Nelson & Sons Company the only tenant of Bergson Company which is engaged in the motor transportation business?

A. Correct.

Exam. Baumgartner: And Gilbertville is a sub-tenant of Nelson's?

The Witness: That's correct, sir.

Mr. Barrett: While we are on it, to keep the record clear, can we ask what Byrnes is, if anything?

Exam. Baumgartner: Is Byrnes a sub-tenant of the Nelson Company?

The Witness: Byrnes?

Exam. Baumgartner: At any place is it a sub-tenant of Nelson Company?

The Witness: It is a sub-tenant of Nelson Company.

Exam. Baumgartner: At what point?

The Witness: At New York.

Exam. Baumgartner: At New York. Is that the only place?

The Witness: It's the only one that I know of.

Mr. Barrett: How about Ellington, Connecticut, while we are on it?

[fol. 443] The Witness: I don't know. I think I answered you earlier on that.

By Miss Kelley:

Q. Nelson is not the only tenant of the Bergson Company?

A. It is not the only tenant.

Q. You were asked about salary that the directors of the Bergson Company receive. Could you give us the amount of that salary either annually or monthly?

Mr. Keenan: Objection to the question unless the period involved is made clear.

Exam. Baumgartner: Yes, will you give us the period?

By Miss Kelley:

Q. You tell us during your last three years and also tell us whether all directors receive the same amounts or if they vary.

A. Ruth Nyberg, Greta Carlson and Howard Chilberg received during the year 1953, \$360 apiece.

Exam. Baumgartner: During the whole year.

The Witness: Again, for 1954 and 1955, those three individuals received \$360 per year. In 1955, to make up for back salaries of the directors, Charles Chilberg, Kenneth Nelson, Clifford Nelson, and Oscar Chilberg received \$1,080.

Mr. Keenan: When was that?

The Witness: In December, 1955.

Exam. Baumgartner: For the year 1955.

The Witness: Actually for three years, \$360 for three [fol. 444] years.

Mr. Keenan: One thousand?

The Witness: \$1,080.

Mr. Keenan: Each?

The Witness: Each, which is three times \$360 for three years.

By Miss Kelley:

Q. All right. At my request did you check the records of Gilbertville Trucking Company to determine the amount due them as of the present date? Mr. Barrett asked the question as of July 31, 1956, and I had in my notes that date and then a later computation. Have sums been paid since July 31, 1956 by Gilbertville to Nelson?

Exam. Baumgartner: To Nelson Company?

Miss Kelley: To the L. Nelson & Sons Company.

The Witness: I testified that as of July 31—you're speaking of Gilbertville to Nelson?

Miss Kelley: Yes.

The Witness: Gilbertville owed Nelson as of July 31, 1956, \$9,621.89, and during August, \$8,221.81 was paid by Gilbertville to Nelson of the old bill leaving a balance of the July payments.

Exam. Baumgartner: On the July amount?

The Witness: Of the July charges, of \$1400 still outstanding.

By Miss Kelley:

Q. And were you able to get a figure as to the current [fol. 445] figure for August?

A. For August?

Q. Yes. Was there a total or were there other bills that have been issued for August?

A. There should not be any because the bookkeepers now give checks for whatever is payable to the respective companies at the end of the month as soon as they get it from the rate clerks.

Q. My point is, are bills rendered other than on a monthly period between the two companies, or are they rendered weekly or how frequently?

A. They're rendered during the month. However, bills for a month may be held up by a rate clerk for checking.

Q. I see, but so far as you know at the present time only the account between them is \$1400?

A. That's right.

Exam. Baumgartner: That's of August 31, 1956.

By Miss Kelley:

Q. You were questioned, if you recall, with reference to who did the repair work for Nelson. It was brought out that some repair work was done by L. Nelson and Sons Company. Do you have knowledge as to other firms who do repair work for Gilbertville Trucking Company?

A. I do have knowledge of other companies doing repair work for Gilbertville, yes.

Q. Could you give us the names of those places or location?

[fol. 446] Exam. Baumgartner: Why is the specificity at this point material?

Miss Kelley: I don't know, but it was restricted and I think Mr. Mueller directed the question as to repair work that L. Nelson did.

Exam. Baumgartner: I recall that, but the witness has

stated they did repair work for others too. Isn't that sufficient? Do we have to have the names and amounts?

Miss Kelley: I don't want amounts particularly, but I just wanted places that Gilbertville had its vehicles repaired if he could give it to us without too much trouble.

Exam. Baumgartner: If he could say five other places, isn't that sufficient?

Miss Kelley: Yes.

By Miss Kelley:

Q. Can you tell us the number of places, as the Examiner suggests?

A. I have down here at least six different places.

Miss Kelley: The Examiner feels that's sufficient for our purpose, so I will go on.

Mr. Mueller: During what period?

By Miss Kelley:

Q. Oh, yes, during what period is that?

A. Since Gilbertville began—I mean was taken over by Kenneth Nelson.

Q. And have those repair places been used consistently since March of 1953 when Kenneth Nelson purchased the [fol. 447] stock of Gilbertville?

A. To my knowledge, yes.

Q. Do you know whether the New York terminal is shared with other motor carriers other than Gilbertville, Nelson and Byrnes?

A. I know it's rented from a trucker, Jordan & Smith.

Exam. Baumgartner: Do you know whether it is?

The Witness: It is.

By Miss Kelley:

Q. Is it your testimony that L. Nelson & Sons rents from a motor carrier by the name of Jordan?

A. Jordan & Smith or Smith & Jordan.

Q. And do you know whether Jordan & Smith or Smith & Jordan occupy part of that New York terminal?

A. I do not know.

Q. Did you tell us on the record what rent Gilbertville Trucking Company pays for the terminal space at Gilbertville, Mass.?

A. \$35 per month.

Q. Am I correct that you testified that the owner of that property is in no way connected with the Gilbertville-Nelson family?

A. That's right. Edgar Rickard owns it of Ware, Massachusetts.

Q. Does the terminal that is known as the Gilbertville Terminal have a street address?

A. Hardwick Road.

[fol. 448] Q. And is that Gilbertville, Massachusetts?

A. Gilbertville, Massachusetts.

By Miss Kelley:

Q. Mr. Solomon, do you recall a question by Mr. Mueller as to whether or not Gilbertville Trucking Company had purchased any equipment from the L. Nelson & Sons [fol. 449] Company?

A. Yes.

Q. And do you recall that your answer was then that you did not recall any such transaction?

A. I did, and last night—

Mr. Keenan: Objection. The witness is going to more than answer the question.

By Miss Kelley:

Q. And did you recheck some of the records that you had available?

A. I did.

Q. And at this time do you wish to change the answer that you made to Mr. Mueller?

A. I would like to. On October 5, 1954, Nelson sold Gilbertville the following equipment; Two 1948 International Tractors that had a depreciated cost to Nelson of \$100 each for \$200 each.

Exam. Baumgartner: I didn't get that. You mean depreciated value?

Mr. Keenan: I would appreciate hearing the answer so far.

Exam. Baumgartner: Miss Reporter, please read the answer.

(Answer read.)

Exam. Baumgartner: What do you mean by that statement? It had a depreciated cost to Nelson of \$100 each for \$200 each? What does that mean?

The Witness: The book cost of the tractor to Nelson is [fol. 450] \$100. You take the original cost less your depreciation.

Miss Kelley: I think if I ask a question I can clarify it.

Exam. Baumgartner: I wish you would. I'm not an accountant.

By Miss Kelley:

Q. Mr. Solomon—

Exam. Baumgartner: When you depreciate an item on the book, my understanding it is has a depreciated value to the owner, not a cost.

By Miss Kelley:

Q. Mr. Solomon, when new vehicles are put on the books of the Nelson Company, is a salvage value set up against each one of those vehicles?

A. That's correct.

Q. Now when you said the depreciated—

Exam. Baumgartner: The purpose of that, establishing the salvage value, is that for the purpose of establishing depreciation over a period of time?

The Witness: The salvage value is to allow what it would be traded in for or sold after a certain number of years.

By Miss Kelley:

Q. Isn't that in accordance with the Commission's regulations?

A. That is correct.

Q. That motor carriers establish a so-called salvage value?

A. Yes.

Q. Insofar as this equipment was concerned, was it completely depreciated except for this salvage value?

[fol. 451] A. It was completely depreciated except for the salvage value.

Exam. Baumgartner: And the salvage value of these two particular items was \$100 each?

The Witness: That's right.

Exam. Baumgartner: What did you mean, "for \$200"?

The Witness: They were sold by Nelson to Gilbertville for \$200.

Exam. Baumgartner: Well, now, that's clear.

Mr. Keenan: Gilbertville paid \$200 apiece of them.

Exam. Baumgartner: I didn't understand that.

The Witness: I'm sorry.

By Miss Kelley:

Q. Were those two tractors the only two motor vehicles that you found were sold by Nelson to Gilbertville?

A. Again, on October 5, 1954, two 1949 International Tractors that had a salvage value of \$100 each were sold by Nelson to Gilbertville for \$200 each.

Q. Well, that sale, then, of these four tractors was on the same date, is that correct?

A. That's correct.

Mr. Keenan: Mr. Examiner, if counsel would entertain it, recross-examination can be shortened if she will merely inquire of the witness what was the original cost of this equipment and at what rate was that depreciated.

[fol. 452] Exam. Baumgartner: Can you do that?

Miss Kelley: I will ask Mr. Solomon if he knows.

Mr. Keenan: And finally the date of acquisition. That gives us the whole picture on it, I should think.

Miss Kelley: The date that Nelson purchased it?

Exam. Baumgartner: The date of purchase, the amount paid, and the amount of depreciation.

Mr. Keenan: Rate.

Exam. Baumgartner: Rate of depreciation.

Miss Kelley: Maybe I can help him because my notes show the date of purchase.

The Witness: The two 1948 tractors, International Tractor No. 57—

Exam. Baumgartner: Skip all those details.

By Miss Kelley:

Q. Just when was it purchased?

A. In March and April of 1948.

Q. That's the first two tractors that you mentioned?

A. That's correct.

Mr. Keenan: Those are the '48 tractors?

The Witness: That's correct.

By Miss Kelley:

Q. What was the cost?

A. One of the tractors cost \$2,737 and the other tractor had originally cost \$2,548.

Q. And over what period have they been depreciated?

A. A 48-month period, four years.

[fol. 453] Exam. Baumgartner: At what rate?

The Witness: 48 months, or that would be 25 per cent per year.

Exam. Baumgartner: That was after deduction of the salvage value?

The Witness: After deducting the salvage value, correct, on the remaining balance.

Exam. Baumgartner: Now answer with respect to the other two.

The Witness: The other two tractors which are 1949 tractors and purchased in October of 1949 were each purchased for the sum of \$2,177 by Nelson.

Exam. Baumgartner: What was the period of depreciation?

The Witness: The same, 48 months.

By Miss Kelley:

Q. Do your records show whether Nelson, during the year 1954, replaced those tractors with other tractors?

A. They replaced them with other tractors, yes.

Mr. Mueller: Excuse me. For clarification, which of these tractors are you now referring to?

Miss Kelley: I'm referring to all four. In other words, did they buy four or more tractors in 1954?

The Witness: Yes, they did.

By Miss Kelley:

Q. Did a careful search of your records disclose any other sales of property from Nelson to Gilbertville?

[fol. 454] A. No other sales of property by Nelson to Gilbertville.

[fol. 455] Q. Now, you were questioned at length with respect to the increase in the assets of Gilbertville and the increase in the indebtedness of Gilbertville Trucking Company during the past, I believe, well, since 1953 up to the present time. Now, will you tell us if the increase in the assets and the liabilities of Gilbertville results principally from—

Exam. Baumgartner: Ask him what the results were from.

Miss Kelley: All right. Thank you, Mr. Examiner.

By Miss Kelley:

Q. What do they result principally from?

A. The increase in the assets, did you say?

Q. Increase in the assets and increase in the liabilities.

A. Well, the increase in the assets primarily are from the accounts receivable with more volume being done.

Q. And so far as the fixed assets are concerned?

A. Fixed assets have increased. At the same time their [fol. 456] liabilities are increasing.

[fol. 457] Exam. Baumgartner: She asked you what was the cause of the increase in assets, not how much they were.

The Witness: Because the liabilities increased, that's why the assets increased.

Exam. Baumgartner: Well, can't you put it a little more concretely than that?

The Witness: Well, buying revenue equipment which is an asset; you then take it upon yourself a liability, so all that's happening—

Exam. Baumgartner: That's the answer that we are asking.

By Miss Kelley:

Q. On the July 31, 1956 statement there appears an item, land—

Mr. Keenan: Objection. Will counsel indicate what document she is referring to as identified by the Court Reporter?

Miss Kelley: Exhibit No. 5.

The Witness: During 1956 Gilbertville Trucking Company purchased land for terminal purposes.

By Miss Kelley:

Q. And where is that land located?

A: Springfield, Massachusetts.

Q. Does the four thousand odd dollars represent the full consideration for that land?

Mr. Keenan: For clarity on the record, I presume counsel is referring to Exhibit 6.

Exam. Baumgartner: Correct.

[fol. 458] **The Witness:** To my knowledge it represents the full cost of the land. I'm not positive of that.

By Miss Kelley:

Q. Is the equipment of Gilbertville purchased, the new equipment you testified to, purchased on conditional sales contracts or under some other arrangement?

Mr. Keenan: Objection, repetition.

Exam. Baumgartner: I think that has been answered.

Miss Kelley: I don't recall it, and I checked my notes distinctly.

Exam. Baumgartner: I asked it myself. It was on conditional sale.

Miss Kelley: Thank you. I didn't take notes on your questions, I guess, **Mr. Examiner.**

By Miss Kelley:

Q. Now, Mr. Keenan addressed a question to you yesterday, Mr. Solomon, with respect to some money due Nelson from the Gilbertville Trucking Company, and his questions covered the periods or the dates specifically of December 31, 1953, December 1, 1954, May 31, 1955, December 31, 1955, and July 31, 1956. Do you recall that?

A. Yes, I do, and—

Exam. Baumgartner: Wait a minute; now, you answered the question.

By Miss Kelley:

Q. Can you tell us how the indebtedness from Gilbertville to Kenneth Nelson arose?

Mr. Keenan: I don't think I understand what counsel [fol. 459] means by the question, if the Examiner please. In other words, does she mean what did Gilbertville give—

Miss Kelley: Let me spell it out.

Mr. Keenan: —what did Kenneth Nelson give Gilbertville in return.

By Miss Kelley:

Q. In answer to Mr. Keenan's question according to my notes, you said that as of December 31, 1953, \$11,792.05 was due to Kenneth Nelson from Gilbertville Trucking Company; December 1, 1954, \$15,024.13; on May 31, 1955, \$14,037 and a few cents; December 31, 1955, \$19,597; and July 31, 1956, \$20,095.

Now, can you tell us what Kenneth Nelson gave to Gilbertville Trucking Company which resulted in that indebtedness, and incidentally, not to confuse the issue I just note here that in answer to Mr. Barrett this morning you said that a note for \$13,270.40 had resulted to Oscar Chil-

berg and Kenneth Nelson for the discharge of the liabilities.

A. Correct. However—

Mr. Keenan: Excuse me. What question is pending to the witness now? I'm definitely confused.

Miss Kelley: It's a long involved one because you claimed to be confused.

Exam. Baumgartner: We are addressing ourselves now to the basis for the indebtedness owed by Gilbertville Trucking Company to Kenneth Nelson as of these dates. Now, [fol. 460] what was the basis for the indebtedness?

The Witness: The basis for the indebtedness is salaries that Kenneth Nelson was entitled to from Gilbertville but he had not drawn. I think some confusion arose this morning when we stated that a sum was due to Kenneth Nelson and his brother, Oscar Chilberg, of \$13,000. I was not asked the question how was the payment of the \$10,000 note that was given to Mr. Vachon, how was that treated when it was paid by Gilbertville.

By Miss Kelley:

Q. Is that involved in your answer to my question?

A. That's correct.

Q. Would you explain it now, please?

A. If you recall, Mr. Barrett, you stated that the \$13,000 figure of note payable that appeared for Kenneth Nelson due from Gilbertville Trucking Company was created by the liabilities paid by the escrow agents on behalf of the Corporation, and I said it was treated as a note payable by Gilbertville to Kenneth Nelson and his brother, Oscar. However, within a year, the \$10,000 note that was due to Mr. Vachon was paid by Gilbertville Trucking Company and that \$10,000 was then charged against the note payable due by Kenneth Nelson.

Exam. Baumgartner: Due to Kenneth Nelson?

The Witness: Due to Kenneth Nelson, correct.

By Miss Kelley:

Q. Now, Mr. Solomon, do you recall your testimony that \$5,000 was invested as working capital by Kenneth Nelson [fol. 461] in Gilbertville?

A. That's right.

Q. Is that reflected in these figures?

A. That is reflected in those figures.

Q. As to the sums owed Kenneth Nelson from Gilbertville?

A. That is correct.

Q. Does that fully explain those obligations of Gilbertville to Kenneth Nelson?

A. Yes.

Mr. Keenan: Objection— Objection withdrawn. May the witness be instructed not to answer a question when an objection is pending?

Exam. Baumgartner: I would have overruled the objection anyway.

Mr. Keenan: That's why I withdrew it, but as a matter of hearing practice—

Exam. Baumgartner: I think you're right, Mr. Keenan. When an attorney starts to object, please refrain from answering and give him an opportunity to object.

By Miss Kelley:

Q. My recollection is that you testified the last year that Greta Carlson received salary from L. Nelson & Sons, was in 1953?

A. That's correct.

Q. And do you know what Greta Carlson's occupation has been since that time?

[fol. 462] A. Yes, she went to work for another corporation, an electronics corporation.

Q. Has she since married?

A. She's a housewife at present.

Q. Now, Mr. Keenan asked you a question with respect to the sums owed by the L. Nelson & Sons Company to members of the Nelson-Chilberg Family as of December 31, 1953. I believe that according to my notes you testified

that Charles Chilberg was owed \$40,279.92; Clifford Nelson was owed \$6,340.22. On December 31, 1953, Greta Carlson, \$5,032.77; Kenneth Nelson, \$3,401.24; Ruth Nyberg, \$3,562.67; and Augustine Nelson, \$3,310.28.

I believe you were asked for an explanation of those sums as to how the obligations arose. Have you checked your records as to the basis for those obligations?

A. I have checked my records.

Q. And can you explain the basis of those individual obligations at this time?

A. Yes, I can. On December 31, 1952, Nelson Corporation owed a note to the estate of Linnea Nelson in the sum of \$24,938.66. When the estate was closed and distributed, the \$24,938.66 due to the estate was then divided into one-seventh for each of the seven children, and the books of Nelson's instead of reflecting one note payable of \$24,938.66, then reflected the sum of \$3,562.67 due to each of her [fol. 463] children, which is dividing the \$24,938.66 by seven.

Q. Now the excess in each of these sums over \$3,562.67 and the sum owed to Augustine Nelson represent what? Do you know what that represented?

A. The father did not take his full salary.

Q. Well, for example, the figure that you gave as being owed to Greta, \$5,000 odd dollars, the difference between the \$3,562.67 and \$5,000 would be what?

A. \$1,470.10 that was due on Greta's salary had not been paid.

Q. And as far as Clifford and Charles were concerned, was that also salary?

A. That was for salary.

Q. Plus the inheritance?

A. That's correct.

Q. Is that Augustine or Gustav?

A. Gustav Nelson.

Q. Now to your knowledge are Mr. Zandan and Mr. Paroshinsky practitioners before the Interstate Commerce Commission or familiar with the Commission practice?

Mr. Keenan: Objection, no relevance.

Exam. Baumgartner: Well, let him answer.

The Witness: I do not know.

Miss Kelley: That's all I have at this time.

Exam. Baumgartner: Let's take a recess until 4:35.

(Short recess.)

[fol. 464] Exam. Baumgartner: Let us come to order. Mr. Mueller, it's up to you to proceed next on recross.

Recross examination.

By Mr. Mueller:

Q. Mr. Solomon, in answer to Miss Kelly, you stated that the L. Nelson Transportation Company—that is, the corporation—does not do any banking business at the Manchester Bank where Mr. Kenneth Nelson and Oscar Chilberg floated their loan as a purchaser of the Gilbertville stock. I would like to ask you whether any of the various members of the Chilberg and Nelson family do business with that bank in Manchester?

A. They do.

Q. Can you name the members of the family who do business with that bank?

A. Yes. Charles Chilberg and Clifford Nelson do business.

Q. Is that all?

A. That would be all to my knowledge, yes.

Q. Now, in speaking of repairs, you have said, in response to Miss Kelly's question, that the Gilbertville Trucking Company has employed at least six repairmen or garage men for the repair of Gilbertville equipment since Mr. Kenneth Nelson took over the stock?

A. Yes.

Q. Can you, in percentagewise, or dollarwise, tell us, sir, how the outside repairs were compared with the volume done in the L. Nelson shops for Gilbertville?

A. I could not give you the breakdown that way, no. Sorry.

[fol. 465] Q. Couldn't you give us an estimate?

A. No, I couldn't.

Q. Could you tell us anything about the nature of the services performed in the outside shops as compared with the nature of the services performed in the Nelson Shop?

A. Yes. To my knowledge they are the same type of services—the outside shops and the ones that Nelson has.

Q. Would a major motor overhaul, for example, be performed in an outside shop or in the Nelson Shop?

A. It would just as likely be done in an outside shop as in the Nelson Shop.

Q. Is there any rule in existence which would determine which—

A. There would not be any rule.

Exam. Baumgartner: Is there any practice?

The Witness: No. There would not be.

Exam. Baumgartner: Any pursuant practice of giving certain types of jobs to the Nelson people?

The Witness: There may be, but I have never looked at it in that light.

Exam. Baumgartner: Not looked at it, but do you know?

The Witness: Do do not know.

[fol. 467] By Mr. Keenan:

Q. Mr. Solomon, am I correct in inferring from Exhibit 23 that the Gilbertville Trucking Company, Inc., owns no real estate?

A. Exhibit No. 23 was to reconcile the figure on Exhibit No. 6—tangible property, carrier operating property, it's headed.

Q. I think that answers my question: In other words, the words that head up the Exhibit No. 23—"All Property"—are a little bit of a misnomer. Is that right?

A. That's right. It should say "Except Land."

Exam. Baumgartner: Yes.

By Mr. Mueller:

Q. No. I think, if I understand it correctly, it should [fol. 468] read "Statement of Ledger Value of All Tangible Property of Gilbertville Trucking Company." Is that right?

A. Thank you very much.

Exam. Baumgartner: Tangible Property Except Land?

Mr. Mueller: Except Land.

[fol. 470] Exam. Baumgartner: Well, I don't think we are going to get into value, either. Does the property that is rented by Nelson from Bergson represent ten per cent of the total property owned by Bergson?

Mr. Keenan: According to what measures?

Exam. Baumgartner: Five per cent, or fifty per cent, or what—

Mr. Keenan: According to what measures, sir? I should like to know how the witness is measuring this percentage—by acreage or book value or cost, or what?

Exam. Baumgartner: Well, let's make it on the square foot basis.

Mr. Keenan: However he can do it.

[fol. 471] The Witness: Then the major part of its property, then, is rented to others, if it's on an acreage basis.

By Mr. Keenan:

Q. How about on a dollar-and-cents basis?

A. That would take me a little time to compute here.

Exam. Baumgartner: Give us a rough approximation, Mr. Witness. I think that will be sufficient.

The Witness: About one-third of the dollar value is rented to others.

Mr. Keenan: I see, sir.

Exam. Baumgartner: Is rented to others?

The Witness: Yes—than Nelson.

By Mr. Keenan:

Q. And is it also true that about two-thirds of the revenue accruing to Bergson comes from Nelson?

A. That would be approximately correct, yes.

Exam. Baumgartner: These are just rough approximations.

[fol. 473] The Witness: There are some properties that are not rented at all to anybody.

By Mr. Keenan:

Q. Does that conclude the answer?

A. Yes, sir.

Q. Now, does Bergson rent property to members of the L. Nelson family? In other words, to any children of Mrs. Linnea Nelson in their private capacity?

Miss Kelley: I object as being immaterial.

Exam. Baumgartner: Do you know?

The Witness: I do not know.

[fol. 474] By Mr. Keenan:

Q. That's a quick answer. With respect to the four tractors sold by L. Nelson to Gilbertville, answer this question, please: On the books of L. Nelson prior to the transfer of the four units of equipment, was this equipment charged with a depreciation expense monthly during each of the 48 months when it was being depreciated at a uniform rate in the journal entries of L. Nelson?

A. That is correct, sir, each month.

[fol. 479] Exam. Baumgartner: Exhibits for identification Nos. 1 through 12 and 22 and 23 offered by the Applicant are received in evidence.

(The documents heretofore marked as Applicant's Exhibits Nos. 1 through 12 and 22 and 23, Witness Solomon, were received in evidence.)

Miss Kelley: Mr. Chilberg.

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VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 40

GILBERTVILLE TRUCKING CO., INC., ET AL.,
APPELLANTS,

vs.

UNITED STATES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FILED NOVEMBER 10, 1961
PROBABLE JURISDICTION NOTED FEBRUARY 19, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

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CHARLES G. CHILBERG was sworn and testified as follows:

Direct examination.

By Miss Kelley:

Q. May we have your name, address, and occupation?

A. Charles G. Chilberg, 33 Reed Street, Rockville, Con-
[fol. 480] necticut, President and Treasurer of L. Nelson
& Sons Transportation Company.

Q. And how long have you been connected with the
L. Nelson & Sons Transportation Company?

A. I have been connected with that company from the
time it began in the early part of 1930.

Q. And prior to your incorporation of the business, had
you been connected with transportation?

A. Yes, ma'am, I was.

Q. And with what company?

A. With the same company, L. Nelson & Sons.

Q. Prior to the incorporation, what type of organization
was it?

A. It was at that time a partnership.

Q. Were you one of the partners?

A. Yes, ma'am.

Q. Who were the other partners?

A. The other partners were my mother, Mrs. Linnea Nel-
son, and my brother, Herbert Chilberg.

Q. Now, did you hear Mr. Solomon's testimony of the
past three days?

A. I did.

Q. And did he correctly identify the officers and directors
and stockholders of the L. Nelson & Sons Transportation
Company?

A. Yes, he did.

[fol. 481] Q. Are the operating rights which the L. Nelson
holds from the Interstate Commerce Commission correctly
reflected in Exhibit A attached to the application?

A. Yes, I believe they are.

Q. Just for the record, will you describe generally the
area and the commodities which the L. Nelson & Sons is
authorized to transport?

A. They have authority to transport textiles and related

items from portions of Massachusetts, Rhode Island, and Connecticut—between those points rather—and New York City and portions of New Jersey and Philadelphia, Pennsylvania, and an area around Philadelphia.

Q. Is the company authorized to serve certain points in New Hampshire?

A. Yes, there is a small portion in New Hampshire they are authorized to cover.

Q. In addition to the authority which the L. Nelson & Sons Company holds from the Interstate Commerce Commission, does it hold authority from certain intrastate boards?

A. Nelson?

Q. Yes.

A. Yes, ma'am, they do. They have authority, intrastate authority in Connecticut and Massachusetts.

Q. Does the company actively operate under its interstate and intrastate authorities?

[fol. 482] A. It does.

Q. Did you hear the testimony of Mr. Solomon with respect to the R. A. Byrnes, Incorporated?

A. Yes, ma'am, I did.

Q. And that transaction was approved by the Commission Docket MCF 5749?

A. That's correct.

Q. Is R. A. Byrnes the holder of a certificate issued by the Commission in Docket No. MC 60186?

A. If is.

Q. And is it also the holder of permit No. MC 93421?

A. That's correct, it is.

Miss Kelley: Mr. Examiner, I believe copies of that certificate and permit are contained in the docket.

Exam. Baumgartner: They're attached to the application.

Miss Kelley: I see; thank you.

Exam. Baumgartner: I have them before me here in the application.

By Miss Kelley:

Q. Will you describe for the record generally the operating authority of the R. A. Byrnes, Incorporated?

A. They have general commodity authority to operate between points in New Jersey and metropolitan New York and Philadelphia, Pa., and, I believe, in some cases into Baltimore, that is into Baltimore and also on the permit [fol. 483] authority to transport canned goods and related items between Philadelphia and Swedesboro, New Jersey, and points in Connecticut and Massachusetts.

Q. Is the canned goods more extensive than just Connecticut and Massachusetts.

A. Yes, it is, to all points in New Jersey. Those are the New England points that I mentioned. It is to all points in New Jersey and metropolitan New York as well as Philadelphia.

Q. And you and your brother, Clifford Nelson, control Byrnes, is that correct?

A. That's right, we do.

Q. Now, does Byrnes have separate equipment from that of Nelson, and is it conducted as a separate, completely separate corporation?

A. Yes, it is.

Q. And where does Nelson maintain terminals?

A. Nelson maintains terminals in Ellington, Connecticut, Newton, Massachusetts, Woonsocket, Rhode Island, Long Island City, New York, and Philadelphia.

Q. Does Nelson have call stations or terminal arrangements at points other than at the terminals that you have named?

A. No. As far as call stations are concerned, it might be possibly construed as such, but we have telephone connections from such points as Lowell and Lawrence, Massachusetts on an enterprise system into Newton and also a [fol. 484] private or a direct wire from Worcester and area into Woonsocket. Other than that, we do not have any other terminals.

Mr. Barrett: May we go off the record?

Exam. Baumgartner: Off the record.

(Discussion off the record.)

Exam. Baumgartner: Back on the record, Miss Reporter.

By Miss Kelley:

Q. Mr. Chilberg, have you caused to be prepared an exhibit showing the number of trucks, tractors, and trailers owned and operated by the L. Nelson & Sons Transportation Company?

A. I have.

Exam. Baumgartner: As of?

By Miss Kelley:

Q. And that's as of July 31, 1956?

A. That's correct.

Q. And is this copy a copy of that exhibit?

A. Yes, it is.

Miss Kelley: Mr. Examiner, I'd like to offer for identification a list of equipment operated by Nelson as of July 31, 1956.

Exam. Baumgartner: The document just referred to will be Exhibit No. 24 for identification.

(The document above referred to as Applicant's Exhibit No. 24, Witness Chilberg, was marked for identification.)

By Miss Kelley:

Q. Mr. Chilberg, does the L. Nelson & Sons Company normally lease equipment to augment its own equipment [fol. 485] and to add to your own?

A. Rarely it does; occasionally it will.

Q. And could you tell us the number of times, the approximate number of times during the past year that the equipment has been leased by your company?

A. Frankly, I wouldn't be able to say. It is that insignificant. If I said perhaps two or three times or less, that would be the maximum.

Q. Now, how many persons are employed by the L. Nelson & Sons Company?

A. Shall I give it in total or as a breakdown?

Q. Will you give the total, then break it down as to the different categories therein.

A. 110.

Exam. Baumgartner: That's the grand total?
 The Witness: Yes, sir.

By Miss Kelley:

Q. Now, how many of that 110 are in the category of office help or clerical, terminal managers, drivers, mechanics, so forth?

A. In other words, a complete breakdown?

Q. Break it down as completely as you can.

A. Office employees, 10; terminal managers, 5; dispatchers, 5; mechanics, 6; utility men, 3; salesmen, 2; 79 drivers.

Q. Now, will you describe generally each of the terminals, the space occupied by Nelson in each of the terminals [fol. 486] and the facilities provided in each terminal, that is, whether or not you have maintenance facilities at each terminal.

A. The facilities are in a general way a normal trucking terminal in that it has or they have platform space and necessary office space to conduct a normal business.

Q. And where do you have repair or maintenance facilities?

A. We have repair facilities at our Ellington terminal and in the other locations it is primarily hired out to independent garages.

Q. It is hired out to who?

A. Independent garages, performed by independent garages.

Q. Where are the 5 mechanics that you mentioned?

A. They are in Rockville or Ellington.

Q. Just so it will be clear on the record, will you explain this reference to Ellington and Rockville? Is that one and the same place?

A. It is one and the same place, and I would appreciate it if it would be construed as such in that we are used to calling it Rockville. It's on the Rockville-Ellington line. Legally speaking, it is in Ellington, it's in the Ellington town, but when I refer inadvertently to Rockville, I mean Ellington.

[fol. 488] By Miss Kelley:

Q. If the transaction here being considered by the Commission is approved and the properties of Gilbertville and Nelson are merged, do you contemplate a change in terminals, in terminal arrangements?

A. No, I don't think we do, not at the present time.

Q. You do know where Gilbertville maintains terminals at the present time?

A. Yes, I do.

Q. And will all terminals of both companies be maintained as far as you know at the present time if the transaction is approved?

A. Yes, that's correct.

Q. Mr. Chilberg, do you understand the terms of the agreement between the two companies for this merger, and, I believe, as fully described by Mr. Solomon in his testimony?

A. Yes, I do.

Q. Could you explain as to how you understand the agreement provides for the merger?

A. As I understand it, Kenneth Nelson will receive a number of shares, which at the present time is determined to be approximately 78, which is based on the value of Gilbertville Trucking Company when it becomes part of the merged operation.

Q. And with respect to the other assets and liabilities of the Gilbertville Trucking Company—strike that.

With respect to the assets and liabilities of the Gilbert-[fol. 489] ville Trucking Company, what's your understanding?

A. It is my understanding that they will be a part of the merged operation.

Q. Whether or not you understand that the L. Nelson & Sons will assume the liabilities of the Gilbertville Trucking Company?

A. Yes, that's correct.

Exam. Baumgartner: That is to say that Nelson will take over both the assets and the liabilities?

Miss Kelley: That's right completely.

By Miss Kelley:

Q. Mr. Chilberg, do you recall the testimony of Mr. Solomon with respect to economies that are anticipated as a result of the merged operations?

A. Yes, I do.

Q. I want to ask you one question. First, going back, do you recall if there was any economy claimed insofar as concerned terminal rents?

A. Terminal rents?

Q. Yes.

A. No, I don't think I do.

Q. You don't recall?

A. I don't recall.

Q. I see. Now, Mr. Solomon stated that the economies were based—strike that.

Mr. Solomon, as I recollect, stated that the anticipated [fol. 490] economies were based in part upon a discussion with you and Kenneth Nelson. Will you explain to us the basis on which you computed the economies?

A. In arriving at those figures, which I feel were really low or even to the point of being extremely low, those economies we studied the operation of both companies and spent considerable time in seeing or looking for places where we could effect economies if the two were combined and that actually is the basis of it in that it was a study or a combined study between the two of us. We found that insofar as many items and work is concerned, there were duplications all along the way which could be eliminated if the two companies could be merged.

Q. Could you tell us on what basis, for example, operating-wise you anticipate economies will result?

A. Well, there would be an elimination of duplicity of mileage for one thing, plus the fact that Gilbertville or Kenneth Nelson rather has purchased some land in Springfield in anticipation of building some terminal facility. If this operation or if these two operations were merged, a facility would be provided there which would relieve us of a great deal of unnecessary cost in that gateways which have to be observed would be accomplished by road drivers which would eliminate the need for so-called backhauling where it would be necessary. That in itself would provide a considerable amount of economy.

Q. Would that result in a savings in time in over-all operations?

[fol. 491] A. Yes, it would. It would permit us to render better service and at the same time reduce operating time and expense.

[fol. 492] Q. Now, if this transaction is approved will there be any—strike that. If the transaction is approved, [fol. 493] will the Gilbertville employees be retained in the merged operations?

A. Yes, they would be.

Q. Do you anticipate that any would be discharged?

A. No. There might be cases, perhaps of clerical work when vacancies occur; they may not be refilled. Other than that, we don't anticipate any.

Q. Will you explain the circumstances which caused you to enter into this agreement for the merger of Nelson and Gilbertville?

A. At some time, I believe it was in 1954, Mr. Solomon, who as you know is our accountant, and also the accountant for Gilbertville, approached me with the suggestion that he thought from what he could see in his work that it would be a feasible thing to merge the two companies. At the time I gave little or no consideration to it because Gilbertville Company was one primarily New England, and we having been in the textile field for so many years had quite late considered it more practical to expand in a more southerly direction from Connecticut. We had negotiated a purchase for a company in New Jersey which at that time, incidentally, around that time which was denied, and it was pretty close to that final finding of the ICC that we entered into negotiations with R. A. Byrnes which is also located in New Jersey.

In other words, I couldn't at that time see the practicality of it because, as I said, the textiles have had for some [fol. 494] period of time a tendency to go more southerly and we wanted to, in a sense, follow the trade as it were. That's the reason I didn't attach any significance to his remark at that time.

Exam. Baumgartner: May I ask, what do you mean by "a tendency of textiles to go more southerly"?

The Witness: Well, there's been a great evacuation.

Exam. Baumgartner: Movement of textile manufacturers towards the south?

The Witness: That's exactly right, that's correct, the closing up of plants and so on in New England going south.

He spoke to me again about it in, I would say, I believe it was in the early part of '55.

Mr. Barrett: By "he" you mean Mr. Solomon?

The Witness: Sir?

Mr. Barrett: You mean Mr. Solomon when you say "he"?

The Witness: Yes. Mr. Solomon spoke to me about it again in the early part of 1955 and even at that time I was not awfully interested, although I did consider it more. I considered it more fully, and after discussing the feasibility of it with him and Kenneth Nelson, we discussed the practicality of it with our attorney, Miss Kelley, and from there it has come to this point.

By Miss Kelley:

Q. In the past have you had any financial interest in the Gilbertville Trucking Company?

A. None whatsoever.

[fol. 495] Q. Have you had an interest in it so far as the fact that it was operated by your brother?

A. From a brotherly standpoint, surely I have been interested in what he's been doing, but a normal casual interest, that's all, just as much as I'd be interested in his family.

Q. Now, does Nelson interchange traffic with Gilbertville Company?

A. Yes, they do.

Q. And how is the interchange effected?

A. The interchange of that is effected either by physical interchange of freight or interchange of trailers.

Q. Does Nelson interchange freight with other carriers as well as Gilbertville Trucking Company?

A. Yes.

Q. How many?

A. With a great many others.

Q. Can you give us an approximate number?

A. Oh, probably at least 15 or 20 other carriers.

Q. Do you interchange freight with carriers that operate in the same area that Gilbertville operates in?

A. Yes; we do.

Q. And could you tell us how many such carriers?

A. Oh, perhaps 6.

Q. Would such carriers be primarily in the northern part of your operation or some of it?

[fol. 496] A. That would be primarily northern. By northern I mean Massachusetts, Rhode Island and points like that, northern New England.

Q. Now are the arrangements for interchange between the L. Nelson & Sons and Gilbertville Trucking Company any different than your interchange arrangements with these other carriers?

A. No, ma'am, there's no difference.

Q. And could you tell us what proportion of the total traffic of the L. Nelson & Sons is represented by the interchange with Gilbertville, that is, either the percentage-wise or dollar-wise or any way you can give it to us.

A. Any particular direction?

Q. No, I want the total interchange and if you can break it down as to traffic originating on your line as against traffic originating on the Gilbertville line it would be all right, or just give us the total figure, whichever is easier.

A. I think I can do it north and southbound better in that northbound I would estimate not more than 2 or 3 per cent; southbound it might be a little heavier, 5 per cent.

Q. Now when you say 2 or 3 per cent or 5 per cent, in other words, a combination of the figures would be a total of 8 per cent?

A. That's correct.

Q. And 8 per cent of what?

A. Of our gross, of our monthly or annual gross.

[fol. 497] Q. Tonnage?

A. Dollars.

Q. When you computed dollar-wise, is that based on Nelson's proportion of the revenue from such a haul?

A. That's correct.

Q. And have you taken into consideration the deduction from the total revenue, the proportion that would be paid to Gilbertville is not in the 8 per cent figure?

A. No, that's right, it is not.

Q. I just wanted to make sure. Now at what points is freight interchanged with Gilbertville?

A. Freight is interchanged with Gilbertville at Monson, at their terminal in Gilbertville, and in some cases at Ellington.

Q. What's the arrangement when interchange is effected at Monson? How is it effected?

A. That freight is effected or interchanged by means of our truck meeting a Gilbertville truck at that point and actually backing a trailer or truck to truck as the case may be to interchange freight, and also it is accomplished by the fact that Gilbertville does have a trailer parked permanently in Monson and whenever necessary Nelson would drop off freight at that trailer, or if it were a sizable amount or depending upon the conditions, the actual trailer would be interchanged or it's possible that, as I said before, the Gilbertville driver would meet our driver at the same [fol. 498] point and effect the interchange of freight in that way.

Q. In Gilbertville how is the interchange effected?

A. Pardon me?

Q. How is the interchange effected at Gilbertville, Mass.?

A. It perhaps might be done the same way in that we would drop a trailer and pick up one of theirs, or if it was only a small amount turn it over to them at that point.

Q. And at what point in Gilbertville would the interchange be made?

A. That would be at their terminal.

Q. Gilbertville; would it be anything other than the ordinary change of freight?

A. No, that's correct.

Q. At Ellington, is that the same situation as Gilbertville?

A. Yes, ma'am, it is.

Q. Now what determines whether the freight will be interchanged at Monson, Gilbertville, or Ellington?

A. Freight consigned to points in Connecticut or Rhode Island would be interchanged at Monson, and freight consigned to other points, Massachusetts points, would be done at Gilbertville or Ellington.

Q. And does the interchange arrangement work the same way when the freight is moving northbound or southbound?

A. Yes.

Q. Can you tell us whether or not freight that originates [fol. 499] on the Gilbertville line that is interchanged with Nelson is routed freight or non-routed?

A. Both ways.

Q. Do you know which is the preponderance?

A. No, I don't.

Q. Will you tell us or describe generally the service that is rendered by Nelson at the present time between the points it is authorized to serve?

A. You mean as to time?

Q. As to time in transit how it operates.

A. It's an overnight service that we render between New England points and New York and Philadelphia or vice versa.

Q. Now does the operating authority of Gilbertville extend—strike that.

To what extent would the merger of Gilbertville and Nelson extend the operating authority of the L. Nelson & Sons Company territory-wise?

A. Territory-wise it would extend or increase our coverage in Massachusetts, I believe, from the western portion, that is, west of the Connecticut River and some points in Rhode Island, and of course it would be of a general commodity nature.

[fol. 503] By Miss Kelley:

Q. To recapitulate, does the operation of Gilbertville and [fol. 504] Nelson, I mean virtually, overlap one another?

A. Virtually it does, yes.

Q. Now commodity-wise this will represent an expansion insofar as Nelson is concerned?

A. Commodity-wise, it would, yes.

Q. What has Nelson's accident record been during the past year?

A. Well, it's been very good. As a matter of fact I'm reluctant to say it because usually something happens when you do, but it has been good, it has been good.

Q. And in the event this transaction is approved and consummated, what position would Kenneth Nelson hold in the merged operations?

A. Actually it hasn't been determined what position he would hold. It would be something of a managerial capacity no doubt, but by his excellent sales record why it might well be in the sales field.

[fol. 508] By Miss Kelley:

Q. Mr. Chilberg, when I asked you the percentage or the volume of interchange between the L. Nelson & Sons and the Gilbertville Trucking Company, according to my notes you said that was 8 per cent of the dollar value of the gross revenue of the L. Nelson & Sons Company. During the recess have you reconsidered it and would you tell me what you meant by that 8 per cent?

A. Yes, I have rechecked it and I found I was in error in that the 8 per cent is the total interline, approximate interline with all carriers. With Gilbertville it would be between 2 and 3 per cent total.

Miss Kelley: That's all I have.

Exam. Baumgartner: Mr. Mueller, you may go ahead with your cross-examination.

[fol. 509] Cross-examination.

By Mr. Mueller:

Q. Mr. Chilberg, you referred to certain call stations where you stated there were telephone connections, for example, from Lawrence and Lowell, I believe, to Newton, and you spoke of a leased telephone line between Woonsocket and Newton.

A. Woonsocket and Worcester.

Q. Woonsocket and Worcester. Well, do you not have leased telephone lines between all of your terminals?

A. Yes, we do. The question was as to call stations and that is often times referred to or construed as being a call station with use of the Enterprise system.

Q. Is the Gilbertville terminal at Gilbertville considered a call station?

A. No, sir, it is not.

Q. Did you formerly have a teletype communication system?

[fol. 510] The Witness: Yes, sir, we did.

By Mr. Mueller:

Q. And was that between all of your terminals?

A. That is correct.

Q. And approximately when was that discontinued?

A. That has been discontinued—I'm not sure of the time—but it has been, I believe, over a year.

Q. Was it discontinued at all points simultaneously?

A. Correct.

[fol. 512] By Mr. Mueller:

Q. In conjunction with the interchange between Gilbertville and L. Nelson & Sons, which you have stated occurs at Gilbertville, are there any incidental services performed such as the preparation of freight bills or bills of lading or the receipt of phone calls?

Miss Kelley: I object. It's very obviously not related.

Exam. Baumgartner: I will overrule the objection. You may answer.

The Witness: To my knowledge there are no services performed whatsoever for us, for Nelson, at Gilbertville terminal.

By Mr. Mueller:

Q. I believe you stated that vehicles are occasionally [fol. 513] leased by Nelson from carriers other than Gilbertville.

A. I stated very, very rarely from other carriers, yes.

Q. Was that your testimony?

A. I stated very rarely.

Q. From whom would such equipment be leased?

A. I believe I said perhaps 2 or 3 times in the past year, and in that case they would have been leased from Gilbertville Trucking Company.

Exam. Baumgartner: Leased from whom?

The Witness: Gilbertville Trucking Company.

Exam. Baumgartner: That isn't the question as I understood it. The question was related to the leasing of equipment from carriers other than Gilbertville.

Mr. Mueller: That was my question, Mr. Examiner.

Exam. Baumgartner: What's that?

Mr. Mueller: That was my question.

Exam. Baumgartner: Yes; when he wanted to know what carriers they were.

The Witness: And I said Gilbertville Trucking Company.

Exam. Baumgartner: This was other than Gilbertville Trucking Company.

The Witness: None other than Gilbertville.

By Mr. Mueller:

Q. I believe that in answer to Miss Kelley you indicated that in the event of the consummation of the proposed [fol. 514] transaction the liabilities of Gilbertville will be assumed by Nelson as well as the assets. I'll ask you whether you were a signer of the contract which is attached to the application herein as Exhibit C-1 and will further ask you to tell the Examiner where in that contract is any provision made for the assumption of liabilities on the part of Nelson.

Miss Kelley: I object to the question, Mr. Examiner, in that it calls for a legal conclusion. We know that the agreement involves the stock and merger of the properties.

Exam. Baumgartner: Well, he is a party to this contract. I think he ought to be able to tell us what's in it and what isn't. I think the contract speaks for itself. It's either in there or isn't in there, but if he can point to some provision that he thinks covers the point, why let's have it.

The Witness: Your question was did I sign it, please?

Mr. Mueller: Yes.

Exam. Baumgartner: That was the first question.

The Witness: Yes, I did sign it.

By Mr. Mueller:

Q. And is there any provision in the contract for the assumption of Gilbertville's liabilities by Nelson?

A. I would have to take time to read this over to refresh my memory on it or refresh my knowledge of it, but I understood that that was part of the arrangement.

Q. Is that your answer?

A. Yes, sir.

[fol. 515] Q. Will you look at Paragraph 7 on Page 2 of the agreement, Mr. Chilberg.

A. Yes, sir.

Q. The one which states: "This agreement contains the entire agreement between the parties and there are no other agreements or understandings between the parties with respect to the subject matter involved in this transaction, and this agreement cannot be modified or amended except by a further agreement in writing signed by all of the parties." Has there been any further agreement in writing?

A. I don't believe so. Not to my knowledge there hasn't, and certainly I would have knowledge, but at least none that I can recall.

[fol. 517] By Mr. Mueller:

Q. Now, Mr. Chilberg, you indicated that in the event the merger were approved there would be an elimination of certain duplications. You have said that you did not anticipate the discharge of clerical employees and so on. What will become of Mr. Kashady and his prestige in the event of this proposed merger?

Miss Kelley: You dropped your voice at the end of the question, Mr. Mueller.

Exam. Baumgartner: Read the question.

[fol. 518] (Question read.)

Exam. Baumgartner: If you will strike the words, "and his prestige," out of that question, I will permit it to stand.

Mr. Mueller: Very well, strike the word.

The Witness: It is expected that Mr. Kashady will be retained.

By Mr. Mueller:

Q. Will he be a stockholder?

A. He will be retained status quo.

Miss Kelley: Mr. Examiner, can I ask the witness what he means by status quo in that case?

Exam. Baumgartner: I think everybody understands what it means.

Miss Kelley: I don't think he gives the same meaning to it that I do.

The Witness: By that I mean he will remain in the same capacity as far as his stocks and his position are concerned.

By Mr. Mueller:

Q. Will he have 24 shares of stock?

A. There is no anticipated change as far as that is concerned.

Q. Well, are his 24 shares a part of the transaction depicted on the Exhibit C-1?

Exam. Baumgartner: To what exhibit are you referring?

Mr. Mueller: Well, the exhibit attached to the contract which is Exhibit C-1 of the application.

Exam. Baumgartner: Yes.

The Witness: What was your question again, please?

[fol. 519] By Mr. Mueller:

Q. Is the Kashady stock included in that tabulation?

A. I believe it is.

Q. And your testimony is that he will retain 24 shares?

A. Those shares which he now holds.

Exam. Baumgartner: Well, Mr. Witness, did you prepare this tabulation?

The Witness: The tabulation was actually prepared by Mr. Solomon. I believe I have the correct one, C-1 you said?

Exam. Baumgartner: The exhibit attached to the contract which is Exhibit C-1 to the application. That's a tabulation that was made for the purpose of arriving at the share valuations, I believe.

The Witness: I will have to ask you to restate the question again, Mr. Mueller.

By Mr. Mueller:

Q. Well, as I understand the contract, Kenneth Nelson is contracting to sell 100 shares of stock to the Nelson Company.

A. That's correct. No, I believe that those 24 shares apparently will be returned to him at that time.

Q. Well, just what do you mean by that? To whom do you refer?

A. Those 24 shares will be returned by Mr. Kashady to Kenneth Nelson if this merger is consummated.

Q. Now I don't suppose you know whether any consideration will pass?

[fol. 520] Miss Kelley: I object to the question.

Mr. Mueller: I'm asking him if he knows.

Exam. Baumgartner: I'll overrule the objection.

Miss Kelley: But, Mr. Examiner, this witness has not been shown to have any knowledge of this arrangement with Mr. Kashady.

Exam. Baumgartner: Well, he can say so, can't he?

Miss Kelley: All right.

Exam. Baumgartner: In other words, I think he can take care of himself. If he doesn't know, he can just say so.

The Witness: I don't know.

By Mr. Mueller:

Q. I understood you to say on direct that the Nelson Company interchanged freight with some 15 or 20 carriers operating in the same general area as the Gilbertville operation.

A. No. I believe I said that in the same general area there were perhaps about 6.

Q. Well, now, are there differences between the interchange arrangements that you have with Gilbertville as contrasted to those you have with these 6 other carriers?

A. No, sir, there aren't.

Q. Do you ever handle freight in interchange with Gil-

bertville from the Nelson line at Ellington, Connecticut destined to points on the Gilbertville authority by means of L. Nelson & Sons equipment leased to Gilbertville?

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[fol. 522] The Witness: No, none to my recollection.

By Mr. Mueller:

Q. Are interchange shipments handled through Monson, Connecticut?

A. Yes, sir, they are.

Q. And is Nelson equipment ever used in connection with the delivery of such shipments through Monson to points on the Gilbertville line?

Miss Kelley: I object to the question again, and I want to call your attention, Mr. Examiner, that this is a point [fol. 523] and this last question too is a point which the Government claimed that they were going to prove in this case, and now they're using this method to attempt to prove it.

Mr. Mueller: Mr. Examiner, we have had testimony on interline shipments.

Exam. Baumgartner: Just a moment, Mr. Mueller.

This is an issue you'd have to meet whether there was an investigation proceeding here or not. You'd have to answer to these questions on the application. Secondly, you're assuming there is something wrong about leasing equipment at an interchange point. You and I know that's commonly done day in and day out between carriers. Your objection is based on the assumption there is something wrong about it.

Miss Kelley: No, my objection is not based on the assumption that there's anything wrong about it, Mr. Examiner. My objection is based solely on the fact that the Government has claimed that there is something wrong with it and it's one of the basis that they have set down. It is a point which they claimed that they were going to prove in this case, but they should not attempt to prove it by the defendant.

Exam. Baumgartner: I will overrule the objection.

Will you answer the question, Mr. Witness?

The Witness: What was the question?

Miss Kelley: May we have the question again?

Mr. Mueller: Shall I restate it, Mr. Examiner?

[fol. 524] Exam. Baumgartner: Yes.

By Mr. Mueller:

Q. Does L. Nelson & Sons lease equipment to Gilbertville which is used by Gilbertville for the delivery of freight interchanged with Nelson at Monson, Massachusetts which is destined for points on the Gilbertville authority?

Miss Kelley: I'm sorry, Mr. Examiner, but that isn't a complete question in my mind. There is no question there. It's a statement there, isn't it?

Could we have it read?

Exam. Baumgartner: Read the question, please, Miss Reporter.

(Question read.)

Miss Kelley: I misunderstood you. Of course, I have my objection.

Exam. Baumgartner: You can answer that yes or no.

The Witness: Yes, they do.

By Mr. Mueller:

Q. Are there any other points at which such interchange is by means of leased equipment?

A. I believe I said before that it didn't occur in Ellington, and now when you ask that question it is true that they do lease from us at Ellington.

Q. At what other points do they?

A. Primarily those two.

Q. Monson and Ellington. Has it occurred in Gilbertville?

A. I don't recall any.

Q. Now, when you interline shipments between Nelson [fol. 525] and Gilbertville, what consideration is given to the revenue accruing on the interlines in determining the divisions?

A. It's on a pro rata basis.

Q. Based upon revenue?

A. Yes, sir.

Q. Has that practice been in effect long?

A. You're referring on interline freight?

Q. Interline freight.

A. That's correct, it has been.

Q. For how long?

A. Ever since it—that same practice is in effect with us with all carriers including Gilbertville. The minute we interline with a carrier a pro rata system is set up.

Exam. Baumgärtner: Upon what is the pro rata based?

The Witness: Between Nelson and Gilbertville?

Exam. Baumgärtner: Between your company and the other transportation companies.

The Witness: In this case, or between Nelson and Gilbertville it's a 60-40 division; Nelson getting 60 per cent and Gilbertville getting 40.

By Mr. Mueller:

Q. Is that the identical basis that you use in interlines with other carriers?

A. The percentage, from a percentage standpoint that is true. However, with Gilbertville that percentage is stabilized in that with the different—over a period of time it is [fol. 526] equalized. When I said before a pro rata basis, I actually meant that the division was set up on a percentage between the two carriers and did not vary. It's stabilized at 60-40.

Q. That percentage prevails regardless of the length of the haul?

A. That's correct.

Q. By either carrier?

A. That's correct, and over a period of time it has been shown to be just about the same whether it be—in other words sometimes they would have the short haul and occasions we would, so it would actually work itself out as to being pro rata set up all the way through, if you know what I mean.

Q. Just for clarity, who gets the larger share of 60?

A. Nelson gets 60 and Gilbertville gets 40.

Q. In conjunction with your interlines with Gilbertville, who does the billing, Mr. Chilberg?

Miss Kelley: Can I have a running objection to all these questions, Mr. Examiner, I trust?

Exam. Baumgartner: Your objection is noted, Miss Kelley.

The Witness: I'm not too sure, but I think Gilbertville does the billing. I'm not too certain about it at the moment.

By Mr. Mueller:

Q. Do you know who collects the charges on it, who sends out the freight bills in connection with shipments that are interlined between the two carriers?

Miss Kelley: I object. If my understanding is correct, [fol. 527] wasn't that the same question as your previous question, "Who does the billing?"

Exam. Baumgartner: He is now asking who makes the collections of the freight charges, am I right?

The Witness: It would be the same company that sends out the bills.

By Mr. Mueller:

Q. That may be Gilbertville?

A. I'm not certain on that point. I would have to check that to be sure.

Exam. Baumgartner: Well, does Gilbertville do the billing where the shipment terminates on your line and delivered by your line to the consignee? Does Gilbertville bill for that?

The Witness: It may, yes, if I'm correct in that Gilbertville does the billing, that is correct, and we bill them for our portion.

Exam. Baumgartner: Am I to understand that Gilbertville does the billing with respect to all freight that's interlined between Nelson and Gilbertville?

Miss Kelley: Well, Mr. Examiner—

Exam. Baumgartner: It does?

Miss Kelley: The witness didn't say that. He said he is not sure, that he has to recheck.

The Witness: Assuming that I was correct, that is so, but as I say I'm not too sure. In other words, Gilbertville would do all the billing and do all the collecting; then we in turn would bill them for our portion.

[fol. 528] Exam. Baumgartner: Irrespective of the fact that the shipment terminated on your line, was delivered by your line?

The Witness: That's correct.

[fol. 539] By Mr. Barrett:

Q. Mr. Chilberg, do you have any knowledge as to whether or not Mr. Kenneth Nelson if this merger is approved and consummated will become an officer in the Nelson Corporation?

A. At this moment I do not know.

Q. Has there been any discussion about it at all to your knowledge?

A. There has been discussion about it, but nothing has been conclusive.

Q. You have a list of the exhibits we were using yesterday?

A. I don't think so.

Q. Exhibit No. 3 shows an operating revenue of Nelson for the—

Miss Kelley: Pardon me, I have misplaced that. What is that exhibit?

Mr. Barrett: Operating statement of Nelson for the year of 1955.

Miss Kelley: Thank you.

By Mr. Barrett:

Q. To continue with my question, it shows a gross operating revenue of nine hundred twenty-four odd thousand dollars. Now my question is—that's correct, is it not?

A. If it's stated on the exhibit, that's correct.

[fol. 540] Q. Now my question based on that is how much of that total freight revenue comes from intrastate commerce?

A. I do not know. I do not know at the present time what the percentage would be.

Q. But whatever there is is included within that?

A. That's correct.

Q. Now you're familiar with Nelson's over-all operations, are you not?

A. Yes, sir.

Q. Are you in a position to give us an answer as to the total volume of traffic then that Nelson might handle in interstate commerce as against that in intrastate commerce?

A. Well, I said that I don't know what the percentage of intrastate would be, and I am not prepared to say. I could give an estimate, but I would not be sure.

Q. Then as far as this proceeding is concerned—let me withdraw that question.

If I asked you the same question relative to other statements of income of Nelson that have been introduced in this proceeding, would the answer be the same, covering different periods?

A. As to the amount of intrastate?

Q. Yes.

A. That's correct.

Q. And as far as this proceeding is concerned, then, we do [fol. 541] not know whether 1 per cent or 99 per cent of the revenues you show in these statements are interstate revenues as against intrastate?

A. The majority, of course, is interstate, but beyond that I'm not prepared to give an estimate on intra.

Q. All right. Do you mean more than 50 per cent at least is interstate?

A. That's correct.

Q. That is as far as you can define it?

A. I could perhaps define it down further than that, but I would have nothing, or I can't give you anything exactly. Let me say it's better than 75 per cent interstate. Beyond that I definitely wouldn't be able to pin it down. I don't know.

Q. Well, that's better. I didn't ask you for an exact figure. I asked you for a reasonable estimate. Now, R. A. Byrnes is controlled at the present time by you and your brother, is that correct?

A. Correct.

Q. Does the Byrnes Company interchange with Nelson?

Exam. Baumgartner: Does the Byrnes Company what?

Mr. Barrett: Interchange with Nelson.

The Witness: They do if it happens to be a commodity which we can handle, yes.

By Mr. Barrett:

Q. And where is that interchange effected?

A. That would be effected at New York.

[fol. 542] Q. And is there any predominant amount of interline between Byrnes and Nelson?

A. No.

Q. Now, does Byrnes interchange freight with Gilbertville?

A. Yes, they do.

Q. And where is that effected?

A. That would be at New York also.

Q. And to what extent is interchange carried on between those two companies?

A. I wouldn't be prepared there either to give you an estimate, but it isn't too much.

Q. Does Gilbertville lease equipment from Byrnes to your knowledge?

A. No, they do not.

Q. Does Nelson?

A. Does Nelson lease from Byrnes?

Q. That's correct.

A. No, they do not.

Q. And vice versa, does Byrnes lease equipment from either Nelson or Gilbertville?

A. Byrnes does lease from, some from Nelson, but Byrnes does not lease any from Gilbertville.

Q. Now you were asked a question on the leasing of equipment by Nelson.

Exam. Baumgartner: By Nelson to others, you mean?
[fol. 543] Mr. Barrett: By Nelson from others.

By Mr. Barrett:

Q. Now that is a question I wanted to ask you. Does Nelson lease equipment to other carriers?

A. Yes.

Q. Among those other carriers does it lease equipment to Gilbertville?

A. Yes.

Q. To carriers in addition to Gilbertville?

A. Other than Byrnes, no, not that I can recall.

Q. How much equipment is leased?

Exam. Baumgartner: Let me ask you a question at this point, may I?

Mr. Barrett: Yes.

Exam. Baumgartner: Didn't you testify a while ago that you interchanged traffic with carriers other than Gilbertville and Byrnes?

The Witness: Yes, sir.

Exam. Baumgartner: Now is there any interchange of equipment involved in the interchanges with carriers other than Gilbertville?

The Witness: There is interchange of equipment between other carriers as well, yes.

Exam. Baumgartner: Well, isn't that tantamount to leasing equipment to other carriers?

The Witness: No, it could be on a trailer-interchange [fol. 544] plan.

Exam. Baumgartner: Well, isn't that leasing?

The Witness: No. If you have an interchange or a trailer-interchange agreement with another carrier, you or he would take your trailer and you would take one of his; it's an interchange plan, but it's not actually a lease between the two. It is a common practice in the industry.

Exam. Baumgartner: I understand that, but I see now what you mean by lease and what you do not mean by it. I just wanted this record to be clear on the question of leasing that was propounded by Mr. Barrett.

By Mr. Barrett:

Q. Do we understand one another, Mr. Chilberg, when I'm referring to leasing of equipment between carriers I'm not referring to the ordinary interchange of trailers?

A. I think so, yes.

Q. Now, I believe my last question was to the effect that to what extent does Nelson lease equipment to Gilbertville if you can give it by day, week or month or what.

A. It varies. I wouldn't be able to give you anything other than perhaps a minimum or maximum. Beyond that I wouldn't be able to.

Q. Would you give us that?

A. I would say it would perhaps be from a maximum or a minimum of 1 to 6 or 7.

[fol. 545] Q. Per what?

A. It might even be per day. May I amend that to say from none to 6. I don't want to be misunderstood on that point.

Q. From none to 6 per what?

A. Per day.

Miss Kelley: What was that?

The Witness: Per day.

By Mr. Barrett:

Q. And now one other question on that point: In the average week, how many days are there where they do not lease any equipment from them?

A. Frankly I have never checked it. I would have to check it to find out how many days in a week when they wouldn't lease. I don't know.

Q. May I ask you this question: Is it rather consistent that you lease some equipment to Gilbertville almost every day of the week?

A. Almost every day, I would say, depending upon our ability to let them have it when they wanted it.

Q. And dependent upon your need for them?

A. It's first dependent on our need to let them have it. Our freight moves first, and if we have a piece that they may need, if we are not going to use it and we see no need for it during the day, then they may lease it.

Q. Now, specifically, what equipment do you lease to Gilbertville and by you I mean your corporation?
[fol. 546] A. What types?

Q. Yes.

A. It would be tractors and on occasions trailers and tractors.

Q. Now, it is true, is it not, that the Byrnes Company, the Gilbertville Company, and the Nelson Company all share a common terminal in New York or at least from the same building?

A. Together with another trucking company, yes.

Miss Kelley: To clarify the record, Mr. Examiner, can we have the name of the other trucking company?

Exam. Baumgartner: Yes, surely.

The Witness: The other trucking company is Smith & Jordan.

Miss Kelley: Who?

The Witness: Smith & Jordan.

By Mr. Barrett:

Q. Now, will you explain the facilities, forgetting what Smith & Jordan has, what facilities Byrnes, Nelson and Gilbertville have in New York?

Miss Kelley: I object to the question, Mr. Examiner, because how a person can describe facilities and forget the part that one has, it's impossible. If he's got to describe the New York terminal—

Mr. Barrett: Let me withdraw that question.

By Mr. Barrett:

Q. This other trucking company, Smith & Jordan, do they occupy a part of that building?

A. Correct.

[fol. 547] Q. Is that separate from the part that these other companies operate?

A. No, sir.

Q. Will you describe the facilities as they exist?

A. The facilities in New York, you might say, were built by sections. By that I mean there is one section added on to

another. The offices are, and again I'm referring to platform and storage area, the offices are in somewhat of a separate building right close to the platform and are segregated into three parts. As far as terminal facilities are concerned, the dock area and so on, there is no actual designation as this is your spot and this is mine and so on. It's a matter of where actually we try to stick to that, but I have gone into the New York terminal where I have seen Smith & Jordan trucks at the docks where perhaps we normally would be and vice versa.

Miss Kelley: When you say, "we," Mr. Examiner, for the sake of clarity, when Mr. Nelson says, "we," and three companies were named, can't we have the record show what company he was referring to?

The Witness: I was referring to Nelson or Byrnes as to the location where they normally use the dock.

Exam. Baumgartner: Nelson or Byrnes?

The Witness: Yes.

Exam. Baumgartner: Is Gilbertville there too?

[fol. 548] The Witness: They operate out of that terminal.

Exam. Baumgartner: Smith & Jordan on the one hand and—when you say three, did you mean any one of these three?

The Witness: You might include Gilbertville in that, although I'm referring primarily to Nelson and Byrnes. I have no interest in looking out for where their trucks were at the city or terminal.

Exam. Baumgartner: Well, that's just a question of how the terminal is being used by the four carriers.

The Witness: Correct.

[fol. 549] By Mr. Barrett:

Q. You stated four carriers share that terminal?

A. Correct.

Q. Smith & Jordan?

A. Correct.

Q. You stated sometimes you'd find Smith & Jordan using the part that your trucks normally use?

A. Correct.

Q. I inferred from that answer, and if I'm wrong correct me, is there some unwritten law or understanding or as far as practical allowing for business conditions and so forth, that Smith & Jordan for the most part uses one part of the terminal?

A. I don't think there is any unwritten law or an understanding. If by chance their drivers become accustomed to using a certain dock area, that might be the case and that's, I believe, solely how it develops. We don't have any—[fol. 550] as I said before—arrangement that we'll use this and that.

Q. If I amend my question by asking you by usage and custom, does that occur?

A. I think I would have to say perhaps yes.

Q. Now, in that usage and custom does Gilbertville use the portion of the terminal that is normally used by Byrnes and Nelson?

A. I think the same condition would prevail there too, in that Smith & Jordan could be over in the area where we would perhaps normally be docked and vice versa. I think the same situation prevails there with other truckers than Nelson or Byrnes. On interline carriers who come in—

[fol. 552]

By Mr. Barrett:

Q. You recall before lunch, Mr. Chilberg, we were talking about your terminal facilities at New York City, Long Island City?

A. Yes, indeed.

Q. And it is used by Gilbertville, Byrnes, Nelson, and a fourth carrier?

A. Correct.

Q. Now, does your company have dispatchers, a dispatcher at that terminal?

A. Yes.

Exam. Baumgartner: Have a what?

Mr. Barrett: Dispatcher.

By Mr. Barrett:

Q. Does Gilbertville?

A. I presume they do.

Q. Do you know?

A. I don't think I'd be qualified to answer what they have down there.

Q. Does Byrnes, or is it a common dispatcher?

A. Common between Nelson and Byrnes.

Q. Do you know whether that dispatcher also dispatches equipment for Gilbertville?

[fol. 553]. A. I'm sure he doesn't. At least he is told to handle only Nelson and Byrnes.

Q. If I ask you a general question as to several terminals that are shared by Nelson and Gilbertville, do you know—I presume Nelson has a dispatcher in each one?

A. That's correct.

[fol. 554] Exam. Baumgartner: Let me ask this question of the witness: Do you know whether or not Gilbertville uses the services of the same dispatcher at the other terminals as Nelson uses or employees?

Miss Kelley: I object to the question whether asked by the Examiner or otherwise.

Exam. Baumgartner: I'm asking if he knows.

Miss Kelley: Oh, I see.

Exam. Baumgartner: Do you know?

The Witness: I would have to answer that they are instructed to handle only Nelson men and equipment.

Miss Kelley: Do you get what the Examiner is asking you, Mr. Chilberg?

Exam. Baumgartner: I asked you if you knew whether these dispatchers employed by Nelson at terminals other than the one we were discussing dispatch or perform dispatching services for Gilbertville as well as Nelson. I ask you do you know whether they do?

The Witness: No, I do not know.

By Mr. Barrett:

Q. Are you familiar with your company's terminals?

A. Which company?

Q. Nelson's.

[fol. 555] A. Yes, I am.

Q. And are you familiar with the fact that Gilbertville also occupies these terminals in conjunction with Nelson?

A. Some of them, yes.

Q. And have you ever seen dispatchers of Gilbertville in these terminals?

A. Yes, I have.

Q. What terminals?

A. Woonsocket, Newton, and in Ellington.

Q. At your home terminal at Ellington, how many units a day, if you know, does Gilbertville have coming in and out of that terminal?

Miss Kelley: I object. This witness has been put on as the Nelson witness. I object to the question being directed to him which relates to Gilbertville. We'll have the Gilbertville witness on the stand, Mr. Examiner.

Mr. Barrett: I asked this witness if he knew.

Exam. Baumgartner: Do you know?

The Witness: No, I do not know.

[fol. 560] Q. In other words, is there a common telephone number for Gilbertville and Nelson at the Newton terminal?

A. Your question is is there?

Q. Yes.

A. I know that Nelson has a telephone number in Newton. I do not know whether or not Gilbertville has that listing because I have never seen it in the telephone book.

Q. If I asked you the same questions relative to your other terminals at least those where Nelson and Gilbertville have joint facilities, would the answer be the same?

A. They would.

Q. Now, you stated that if this application were approved you contemplate no terminal change, correct?

A. That is correct, as I stated this morning, although there might be some changes in regards to the possible

setting up of a terminal in Springfield. I outlined that myself this morning, I believe.

Q. Are you contemplating the possibility of establishing a facility at Springfield, Springfield terminal at Springfield if this application is approved?

A. Yes; I daresay that if this merger is approved we are contemplating such a move.

Q. Now, you have been mentioning Monson and another [fol. 561] place as a point of interchange between Gilbertville and Nelson. Will you tell us exactly what facilities are at Monson where you effect this interchange?

A. As I stated, I believe this morning, that there were occasions when the physical interchange would take place with actual meeting of the two different trucks on the road.

Q. You told us how it was done this morning?

A. Yes.

Q. Now I'm asking you where and what facilities there are.

A. A trailer is parked or spotted in Monson for the receipt of freight or for the use of that handling of that freight.

Q. Is that a usable trailer?

A. It's a usable one.

Q. And is that trailer left all the time, or is that one taken and replaced?

A. If that one is taken out it's immediately replaced.

Q. Who is the owner of that trailer station?

A. It might be Gilbertville; it might be Nelson. Originally, incidentally, it was Gilbertville's, and by virtue of the interchange it does change.

Q. Where is that left, in the field or what?

A. Well, it's a parking lot. It's a lot suitable for that sort of thing.

Q. Just a public parking area?

A. I don't think it's public. It's privately owned, I'm [fol. 562] quite sure of that.

Q. There is no ownership by the Gilbertville Company or Nelson of the property?

A. That's correct.

Q. Assuming that trailer is there empty today and Nel-

son comes up and puts some freight in it, I take it that's what happens?

A. Correct.

Q. What happens after the freight is put in it?

A. When Nelson is going to put freight in that trailer, Gilbertville is notified of that handling and then they come and pick it up or handle it whatever way they'd want to handle it. In other words, they are notified it is being put there or that it is there and they come and I presume pick it up for the delivery.

Q. In the reverse direction, assuming Gilbertville comes along and puts freight in the trailer—

A. Correct.

Q. —the same thing happens?

A. That's exactly right.

Q. At all times there's somebody to check the freight in and out of that trailer no matter who puts it out?

A. There isn't anyone stationed there to check the freight in and out.

Q. Now where is the principal hub of Nelson's operations [fol. 563] today? Do you understand what I mean by that?

A. I wish you would explain it a little more.

Q. The hub, the principal base where all their operations fan out from.

A. I would say at the main office in Ellington.

[fol. 566] Q. Do you know—I'm just asking you to your knowledge—do you know how Gilbertville provides its operations between Boston and New York today?

A. No, I do not. The same answer would apply to most any trucking company. I have a knowledge just if I would about J. A. Garvey, but explicitly I don't.

[fol. 637] Q. You stated on direct examination in regard to the merger that Nelson wanted to go south, is that correct?

A. That's correct.

Q. And that's when you bought the R. A. Byrnes stock [fol. 638] and that did go south to some extent?

A. That's correct.

Q. Is it your anticipation in the future to merge the properties of Byrnes into Nelson allowing for your accountant's advice and the tax problems and the tax savings that are involved?

A. When it is expedient, we do intend to merge the two with Nelson, yes.

Q. But meantime you want to take advantage of the tax benefits that might accrue?

A. That's correct.

Q. Incidentally, before I continue on my notes here, has Nelson ever operated tank vehicles to your knowledge?

A. No, they have not.

Q. And to your knowledge has Gilbertville operated tank vehicles?

A. To my knowledge they have not.

Q. So then neither carrier to your knowledge has transported commodities in bulk?

A. That's correct.

Q. Now you testified that Nelson in addition to Gilbertville interlines with some 15 to 20 other carriers. Do you recall that testimony?

A. Yes, I do.

Q. I presume that 15 or 20 is an estimate?

[fol. 639] A. That's correct.

Q. Of those, your company interlines with carriers at Philadelphia, does it not?

A. It does.

Q. Can you estimate how many of—strike that.

And those carriers transport traffic to or from south or west of Nelson's lines?

A. That's correct.

Q. Out of this 15 or 20 other carriers, can you estimate how many of those are carriers who interchange with you at Philadelphia?

A. I would say that the majority of them would be those that interline with us at Philadelphia, although at the moment I wouldn't be able to give you an approximate number of them.

Q. You interchange with other carriers at Boston to or from traffic moving in northern New England states?

A. Yes, we do.

Q. Approximately how many there if you can tell us?

A. Well, I would estimate perhaps two or three. There may be more.

Q. And those carriers transport traffic to or from points generally that neither Nelson nor Gilbertville serve, is that correct?

A. No, the figure that I gave yesterday—beg your pardon. That is true in some respects. By that I mean some [fol. 640] of those carriers that we transfer to in Boston operate in a more northerly direction, whereas there are some that we transfer to that serve the territory similar to or the same as Gilbertville that are more westerly in Massachusetts.

Q. Well, just so my question will be clear, I was asking you for the number of carriers that you interchange with at Boston that serve points in the three northern New England states and you said three or four.

A. That's correct.

Exam. Baumgartner: What three states do you refer to, Mr. Barrett?

By Mr. Barrett:

Q. Did you understand them as Maine, New Hampshire and Vermont?

A. I did.

Q. Now, in addition you stated that there was or there were some carriers that you interchange with that serve the same or similar territory served by Nelson and Gilbertville?

A. Not exactly. I believe I said that Nelson transfers or interchanges freight with other carriers that serve similar or the same territory as Gilbertville.

Q. Where do you interchange with those carriers?

A. We interchange with those carriers at Woonsocket, Worcester, and I believe in some cases in Springfield.

Q. Now, how many such carriers are there that serve substantially the same territory as Gilbertville?

[fol. 641] A. I believe I stated about 6 all tolled.

Q. Could you name them or at least some of them?

A. Yes; Salem Brothers, Blue Line Express, Holly's Express. I can't think of any others at the moment.

Q. Now, Holly's Express serves substantially the southern part of the State of Rhode Island?

A. That's correct.

Q. And generally is that the traffic you interchange with them, southerly Rhode Island traffic?

A. Some of it, yes.

Q. What other traffic do you interchange with them moving into what general areas?

A. At the moment the only traffic that I can think of would be to the southerly part of Rhode Island.

Q. And just for the record, Holly's is a carrier located in Rhode Island?

A. Correct.

Q. Blue Line Express is a carrier located in, I think it's New Hampshire, right?

A. Nashua, New Hampshire.

Q. Generally what traffic, where do you interchange with that carrier, generally?

A. We interchange with that carrier in Woonsocket or Worcester or even on occasions we'll make arrangements to meet their truck up in the Lowell-Lawrence area, and [fol. 642] by that I mean we'll meet them on the road and interchange freight between us in that way, and it is for freight destined to points in New Hampshire and in some cases Vermont, I believe.

Q. Now I ask you the same question relative to Salem Brothers. Can you answer it?

A. Salem Brothers, it's interchanged with them, I believe, it is Worcester. That would be for freight destined to the western part of Massachusetts.

Q. To backtrack a little bit, I assume the majority interchange point with Holly is Woonsocket?

A. That's correct; with Holly?

Q. Yes.

A. That's correct.

Q. Now, other than these figures and carriers you have given us where the interchange is at a New England point, the balance of them are the Philadelphia interchange carriers?

A. Not completely. We do interchange with a few carriers in New York, New York City.

Q. Approximately how many?

A. Offhand, perhaps two or three, I'm not too certain.

Q. Allowing for that estimate of two or three, would the balance be the interchange of Philadelphia carriers?

A. Yes. You have to allow to my figures as to the total, I'm not exact.

Q. I realize you're giving estimates. Now the three New [fol. 643] England carriers you interchange with, is that routed or unrouted traffic?

A. Both ways, routed and unrouted.

Exam. Baumgartner: By the word routed, I presume you mean routed by the shipper?

Mr. Barrett: That's what I understood.

By Mr. Barrett:

Q. Did you understand the same?

A. That's correct.

Exam. Baumgartner: Of course, all freight is routed by someone.

By Mr. Barrett:

Q. Now you stated with Gilbertville you made the interchange at your three points, Monson, Gilbertville, Mass., and at Ellington, Connecticut, do you recall that?

A. Yes.

Q. Will you first tell us what's the determining factor as to where or which of those three points the interchange is expected?

A. The determining factor would be as to what gateway must be observed.

Q. By whom?

A. By Gilbertville.

Q. Now, let's take it first on northbound operations out of New York, we'll say destined to a point in Massachusetts, and of course I'm presuming it's a shipment that comes within Nelson's scope of authority. What destination points [fol. 644] are interchanged at Monson?

A. Those points for delivery in Connecticut or Rhode Island.

Q. Now, assuming there is such a shipment on one of your vehicles that leaves New York, and we'll assume it's a less-than-truckload shipment for the moment, will you tell us physically how that is handled by your company up until the point that Gilbertville takes it?

A. Up until the point that Gilbertville takes it?

Q. That's right.

A. It would be, of course, combined with other lading of our commodity and it being an LTL shipment would be broken down at Rockville and that truck would be destined to some other point, of course, and would effect the interchange at Monson as I outlined yesterday, either by meeting a Gilbertville truck on the road or transferring the freight on a trailer that is stationed there or the interchange of those two trailers.

Q. We are referring now to less-than-truckload shipment?

A. Yes.

Q. That would not be interchanged with the trailer?

A. Yes and no. It may or may not depending upon the expediency of the movement.

Q. Assuming it was a 500-pound shipment?

A. It would be transferred, perhaps, to the trailer that is standing there.

Q. Now, on the similar movement from New York City [fol. 645] except that it's a truckload shipment, how would that be handled?

A. Destined to points in Connecticut?

Q. There would be interchange at Monson?

A. That's correct.

Q. Now the questions I'd like you to answer are these: What would be the destination point of that truckload shipment that was interchanged at Monson and how would it be handled by your company until it gets to Monson?

A. It would be brought into Rockville as normal, as would be normal, and the driver would be dispatched from Rockville to Monson to—in the case of a straight load the interchange of the trailer.

Q. If it were interchanged at Monson, generally what's the destination point?

A. Generally where?

Q. Yes, what area?

A. Of course you might be delving into which direction our traffic is running, but generally speaking it might be considered as being Rhode Island.

Q. Now isn't it a fact that your own company has authority to serve a major portion of the State of Connecticut?

A. Isn't it a fact?

Q. Yes.

A. That's correct.

Q. Is it your company's practice to transfer to Gilbert-[fol. 646] ville at Monson traffic that is destined to points that can be served directly in Connecticut?

A. Will you restate that?

Q. Is it your company's practice to interchange with Gilbertville at Monson traffic to a point in Connecticut or Rhode Island that your company is authorized to serve direct under its own authority? Do you understand the question?

A. I do, but it occurs to me, it occurs to me now, in the previous questions we have not been talking about wool or have I been wrong?

Q. Before you go ahead, I think the first question on this line I put in assuming it was a commodity that Nelson was authorized to transport.

A. To go beyond our territory in either Connecticut or Rhode Island?

Q. I didn't ask you that question then; I'm asking you now. I asked you again to what territory, into what territory was the destination point and you said Rhode Island and Connecticut as far as Monson interchanges.

A. If you don't mind, I should like to perhaps straighten the record out in that I want it clear that we do not transfer freight to Gilbertville to points that we are authorized to serve. Now if it has gotten or is construed to be that, it was erroneous and I don't mean to infer that. In points or to points in Rhode Island and Connecticut that we are [fol. 647] not able to serve, they are the ones that are transferred in some cases to Gilbertville or other carriers I have mentioned before.

Q. So, in short, you provide direct service to your own points?

A. Wherever possible, absolutely.

Q. Now, as far as the interchange at the Gilbertville terminal is concerned, first in a shipment moving out of New York by your company, your company transports, where is that traffic generally destined?

Miss Kelley: I'm sorry, could I have that question read?

(Question read.)

Miss Kelley: Thank you.

The Witness: It would be destined to points in Massachusetts.

By Mr. Barrett:

Q. Once again, would it be destined to a point in Massachusetts that Nelson could serve direct?

A. On occasions we have done that in that it might be to a point where we do not plan to serve or to a point we are not planning to serve that day due to the fact that the amount of freight doesn't warrant going there. We have done that with other carriers in that we'll transfer an item to them to a point which we are authorized to serve but for economy reasons we'll transfer it to another company, and that is true on occasions with Gilbertville on that point.

Q. As a common practice among common carriers for economy reasons, particularly on less-than-truckload shipments, that is done, is that not right?

A. I believe that is the practice, true.

Q. But my question was based on generally.

A. Generally we do not do that.

Q. Now speaking generally once again, and to allow that practice just described as an exception to the rule, what areas in Massachusetts is this traffic destined that your company would interchange with Gilbertville at Gilbertville?

A. You want me to name the cities or the sections?

Q. The sections of the state.

A. I would say the northern, the north central portion of Massachusetts, if you follow me. Let me say perhaps more concisely, north of Worcester, those points north of Worcester or northwest of Worcester. Do you know the point I mean?

Q. Well, if it helps to give the areas of the state with relation to some principal cities.

A. Surely, Fitchburg, Leominster, Gardner, in that area there, Spencer, Mass.

Q. Now, while you have the map out, how about—is that the only general area you interchange with Gilbertville?

A. That is the only area that I can think of at the present time.

Q. And as far as the movement is concerned out of New York to Gilbertville, is it substantially the same as you described for the Monson interchange? In other words, it goes into Rockville and then it's taken to the interchange point?

[fol. 649] A. That's right.

Miss Kelley: Mr. Examiner, I'm wondering if there will be confusion in the record with reference to Gilbertville, Mass., and Gilbertville Trucking Company. In those last few questions, I believe it was clear, Mr. Barrett, that you meant interchange at Gilbertville, Mass.

Exam. Baumgartner: At the point of Gilbertville.

Mr. Barrett: That's correct.

By Mr. Barrett:

Q. So the record will be clear, your company does not interchange with any other carrier at Gilbertville, correct?

A. That's correct.

Q. Only Gilbertville Trucking?

A. That's correct.

Q. Any time Gilbertville is mentioned it will refer to Gilbertville Trucking Company where the point is mentioned?

A. That's right.

Q. Now, once again, in reference to Ellington, Connecticut, interchange with Gilbertville Trucking Company on shipments moving northbound out of your New York-Philadelphia area, what traffic is interchanged at Ellington?

A. It would be traffic consigned to Massachusetts points.

Q. And would you tell us how that physical operation is effected?

A. That is effected by the arrival—from the arrival of [fol. 650] the road trucks.

Q. Nelson road trucks?

A. That's right. They'd be broken down at Ellington.

Q. At Ellington?

A. Right.

Q. And then what happens?

A. For transfer to whatever carrier is going to be involved.

Q. Well, here we are referring specifically to Gilbertville only.

A. Then, in many cases they would be—or that freight would be delivered to them at Gilbertville or they would be told that we have freight for them and each case perhaps would be—or each day's activity would be handled as a separate handling. In other words, it would vary.

Q. Now, as far as part of your answer to that question is concerned, you stated it would be turned over to them at Gilbertville?

A. Correct.

Q. In my preceding line of questions I asked you about interchange with Gilbertville which would include that traffic.

A. We would also turn traffic to them at Gilbertville as well as other points. I stated before, for economy reasons we wouldn't want to cover.

Q. And in addition you interchange at Ellington?

A. That's right.

[fol. 651] Q. And you described your company's road tractor, road vehicle, would bring the shipment into Ellington and then you would call Gilbertville and tell them there was freight there and to pick it up.

A. Notify them it was there because they operate out of that terminal; they would be notified there was freight to be handled by them.

Q. And they pick it up from the docks in less-than-truckload shipment and take it to a destination in Massachusetts?

A. In some cases. We would always take it as far as we possibly could. If it were in line with our traveling in Massachusetts and we could drop it off at Gilbertville, we would do it.

Q. I understand that Mr. Chilberg, but we have already

talked about Gilbertville interchange. Now I'm asking you about Ellington. That freight which you interchange at Ellington would be picked up at the docks there and taken to destination?

A. That's correct.

Q. Or, in the case of that being truckload what would happen where the interchange was at Ellington, Connecticut?

A. They would also—that same thing would be true in that they would be notified of a truckload shipment and it would be their responsibility to handle it after that.

Q. And in some cases where they are informed that there is a shipment for them at Ellington, do I understand correctly [fol. 652] from your prior examination that equipment is leased from your company to them to handle the shipment?

A. Only if they don't have equipment of their own and we are able to lease to them.

Q. And in some instances that happens?

A. In some instances it does, yes.

Q. Now, if I asked you the same questions relative to the interchange between your company and Gilbertville on traffic moving in the reverse direction, in other words from New England to New York and Philadelphia, interchange at these three points, Monson, Gilbertville, and Ellington, would your answers be substantially the same?

A. They would.

Q. Where there is interchange of traffic between your company and Gilbertville at Monson on an interchange of trailer basis, is that always trailer for trailer?

A. You're speaking of full-load interchange?

Q. Well, I assume that's the majority of the times when you interchange trailers.

A. Correct, that's a physical interchange of trailers at that point.

Q. On an interchange of trailer basis?

A. That's correct. One company would bring one, take the one that's there whether they'd be dropping or picking up a full one.

[fol. 653] Q. Now, between the three points, Gilbertville, Ellington, and Monson, at which of the three is the majority of the interchange effected?

A. I wouldn't be able to say; I do not know. I'm not in on every move by any stretch of the imagination.

Q. I realize you're not, Mr. Chilberg, but you must have some knowledge, being the head of the company, as to where the predominant amount of it is.

A. No, I'm sorry to say I do not know.

Q. Do you know how frequently you interchange at Ellington with Gilbertville?

A. Other than saying I believe it is frequently, I wouldn't be able to qualify it any further than that. It is rather frequent.

Q. Would you say as a general rule it's almost daily?

A. I wouldn't. I would rather not be pressed to say other than what I have. It is frequent. Beyond that I do not know. I'm out of the office a great many days, and I do not know.

Q. If I asked you the same question about Gilbertville?

A. The same would hold true.

Q. And Monson?

A. That's correct.

Q. Let me ask you this to your general knowledge: At Monson there is, practically no facilities for interchange, is that correct, other than the trailer station there?

[fol. 654] A. Other than the trailer station there, that's correct.

Q. At Gilbertville and Ellington I take it there are terminal facilities at both of those points?

A. Correct.

Q. Normally, could you tell us in view of those physical circumstances whether or not there is more interchange at Gilbertville and Ellington than at Monson?

A. The thing that determines it as far as Monson is concerned is destination of the freight.

Q. I realize that, but keeping that in mind, do you know whether or not because of the flow of the traffic whether there is more traffic interchanged at Monson than other points or vice versa?

A. No, honestly I can't give you any better estimate of what the volume is out of either one of those three points.

[fol. 669] Redirect examination.

By Miss Kelley:

[fol. 670] By Miss Kelley:

Q. Mr. Chilberg, do you recall some questions of Mr. Mueller yesterday with respect to the stock which is registered to Mr. Kashady?

A. Yes, I do.

Q. Now, will you tell us whether or not you understand under the terms of the agreement that Gilbertville stock is to be exchanged proportionately for the Nelson stock?

[fol. 671] A. That's correct, I do understand that.

Q. Now in the future or after the merger, if Mr. Kashady is a stockholder-at all will that be of Nelson stock?

A. That's correct.

Q. Mr. Chilberg, it appears that your company has a substantial pool of equipment. Is the equipment normally operated to full extent daily in the Nelson operation?

A. In our particular line of specialized commodities, namely, textiles, it has a very, very wide fluctuation of usage of equipment. In other words, the demand and non-demand for textiles vary widely in that or the result of which would be that on some day we would have no equipment available for anything or anybody, and by the same token in a very few days or even the next day there would be a great number or a considerable number of idle equipment, which is brought about solely by the textile field or the activity within the textile field.

Q. Now could you tell us to what extent the idle equipment in the Nelson fleet fluctuates from day to day? In other words, the minimum number that you might have idle to the maximum number you might have idle on a particular day on a particular period.

A. It would vary from a minimum, of course, of none to where I have in the parking yard at our terminal in

Ellington I have counted as many as 20 idle trailers and [fol. 672] equal number of tractors. It has been very very wide variance. I mean I have gone there and counted up the equipment and found a considerable number, as I said, I have counted as high as 20 idle pieces.

Q: Are you familiar enough with the operations and the motor vehicles of competitors in the textile field, transportation field, to know whether the situation with respect to your company's equipment is comparable to the situation that all carriers engaged in or specializing in hauling textiles are faced with?

Mr. Barrett: I object to the question, Mt. Examiner.

Miss Kelley: Well, first I'm asking him whether or not he is familiar with any of their operations to know.

The Witness: In a general sort of a way I am.

Mr. Barrett: I wish the Examiner would instruct the witness when there's an objection to refrain from answering until the Examiner has ruled on the objection.

Exam. Baumgartner: I thought your objection had been overcome, Mr. Barrett, when Miss Kelley said she was just simply asking him if he knew.

Mr. Barrett: He has already answered. I withdraw the objection at this point.

Exam. Baumgartner: But I will ask you to refrain from answering until the objection of counsel has been ruled on.

The Witness: I understand that fully, sir, and it was not my intent to get the answer in before the objection was [fol. 673] ruled on. During the lull I inadvertently answered it.

By Miss Kelley:

Q. Do you have specific knowledge of the equipment or the use of equipment of any of the competitors in the textile transportation field to make a comparison as to their idle and fully-used equipment during periods or not?

[fol. 674] The Witness: Specifically I do not.

By Miss Kelley:

Q. What determines whether a vehicle will be leased by Nelson to Gilbertville?

A. The determining factor would be our ability to let them have it, as to whether or not we had any available for that purpose.

[fol. 676] By Miss Kelley:

Q. Does Nelson transport traffic destined to a number of consignees at Pittsfield, Mass., or is it limited to one?

A. It's limited to just a few; by that I mean two or three.

Q. Well, is there one principal account among that two or three?

A. Yes, very definitely so, one principal account.

Q. And does the majority of the traffic that you handle—strike that.

What proportion of the traffic originating on Nelson's line moving to Pittsfield moves to one account?

A. Perhaps 70 to 80 per cent.

Q. Do you have both inbound and outbound shipments from that shipper or consignee?

A. Yes, ma'am, we do.

Q. Do you know whether the shipments moving to and from Pittsfield for that one account are collect or prepaid shipments? Take first shipments originating at New York moving to Pittsfield. Are they collect or prepaid?

[fol. 677] Mr. Barrett: I object. I don't see any relevancy whether it's one or the other.

Exam. Baumgartner: I was just about to ask you what special significance has that?

Miss Kelley: I will tie it in, Mr. Examiner.

Mr. Barrett: I withdraw the objection.

Exam. Baumgartner: You may proceed, then.

By Miss Kelley:

Q. Will you answer the question:

A. When that shipment is destined to Pittsfield it is prepaid.

Q. And when the shipment moving from that account to some other point on your line, taking into account that there is an interchange there, I believe, is it prepaid or collect? Southbound movement—withdraw that. On a south-

bound movement, on southbound traffic out of Pittsfield for the one account that you referred to, is it collect or prepaid?

A. That is collect.

Q. As to that account, does the interchange carrier or Nelson do the billing?

A. Nelson does.

Q. Now, is all traffic moving to or from that account in Pittsfield, Mass., interchanged with the Gilbertville Trucking Company?

A. Yes, ma'am, it is.

Q. Do you interchange traffic moving to and from Pittsfield, Mass., with carriers other than Gilbertville?

[fol. 678] A. Yes, ma'am, we do.

Q. And is that routed traffic or unrouted?

A. Both routed and unrouted.

Q. And do you recall the questions of Mr. Mueller yesterday with respect to the division of a revenue on traffic interchanged between Nelson and Gilbertville?

A. I do.

Q. Do you have an arrangement with any other interline carrier which is the same or comparable to that which you have with Gilbertville Trucking Company with respect to interline?

Exam. Baumgartner: With respect to divisions?

Miss Kelley: Pardon me, divisions, thank you. Mr. Examiner.

The Witness: Yes, we do.

By Miss Kelley:

Q. And in what area or how many carriers do you have such an arrangement with?

A. One that I can think of at the moment which operates or connects with us at Philadelphia.

Q. What area does that carrier serve?

A. He services or serves—it's in Pennsylvania. As to the direction I'd have to look at a map, but he services a portion of Pennsylvania which we are not authorized to serve. Forgive me for a minute, I can think of the county.

Q. Is his authority limited to one county?

A. No, no, but I mean that general area in Pennsylvania. No, he is not limited to that one county, but when I think [fol. 679] of that particular county I always think of him serving that general locality.

Q. Well, I don't think it's too material if you can't recall it at the moment. So could you tell us what the division arrangement is with that carrier?

A. With that company it's 65-35, 65 is Nelson's share.

Q. And can you give us the name?

A. Showalter Trucking Company.

Q. Do you have a method of communicating between the various terminals?

A. Yes, we do.

Q. And what is that method?

A. That method is a private telephone wire system between our terminals.

Q. And what terminals does it connect?

A. It connects Ellington, Newton, Woonsocket, Long Island, Philadelphia, and it also connects with our R. A. Byrnes terminal in Bridgeport, New Jersey, and it also connects with Gilbertville's terminal at Gilbertville, Mass.

Q. Is that line shared with Gilbertville?

A. Yes, ma'am, it is.

Q. Is it shared with Byrnes?

A. Yes, ma'am.

Q. Now with respect to telephones, do you know whether or not Gilbertville has a telephone listed at Ellington, [fol. 680] Connecticut that is different than the Nelson telephone, or is it the same?

A. They have their own telephone listing in Ellington.

Q. Do you know anything about telephone listings at Gilbertville, Mass.?

A. They have their own listing there. I'm quite sure. As a matter of fact, they must. We don't have any of that.

Q. What's the arrangement at the other terminals with respect to telephones that you know that Gilbertville might make use of them?

A. I'm quite sure that they have their company listed showing our number, although I have never seen it in a telephone book. And I might add that I looked at this book out here and I could not find it, although they show our

number on their bill of ladings or rather on their pros. I assume that it is listed in respective phone books the same way.

Q. Does the Gilbertville Trucking Company pay the Nelson Company anything for the use of telephones?

A. Yes, ma'am, they do.

Q. How much?

A. The telephone charges on that we have are divided between the three companies, which means that Gilbertville is paying us \$400 a month for telephone service.

Q. I don't know whether or not you'd have this information or not, but insofar as this telephone between terminals is concerned, would you know the use to which [fol. 681] or the proportionate use to which each company puts that phone? I mean my point is can you tell whether one uses it more than another?

A. No, I have no idea. I have no idea as to who would use it more. The fact that Byrnes and Nelson being under dual control, it would almost be a foregone conclusion that they, of course, would use it more than Gilbertville would, but as to the exact amount I'm not sure. I do not know.

Q. As to their connection south of New York, would Gilbertville have any, to your knowledge, any reason for using the telephone?

A. No, ma'am, they would not.

[fol. 682] By Miss Kelley:

Q. Going back to the testimony that you gave me with respect to your interchange with Showalter in Pennsylvania, do you know which company does the billing on traffic interchanged with Showalter?

A. Nelson does.

[fol. 683] Q. Do any other carriers share the terminals other than Nelson and Gilbertville at Woonsocket, Newton, or Ellington, Connecticut?

A. Of those three points none are shared—or rather, let me put it this way: No one other than Gilbertville shares terminal space in Ellington and Newton. In Woonsocket, Blue Line Express shares that facility.

Exam. Baumgartner: Together with?

The Witness: Together with Gilbertville and Nelson.
[fol. 684] Mr. Barrett: Mr. Examiner, off the record for a minute.

Exam. Baumgartner: Off the record.

(Discussion off the record.)

Exam. Baumgartner: Let's get back on the record now.

By Miss Kelley:

Q. Does Blue Line have a telephone listing at Woonsocket, Rhode Island to your knowledge?

A. I do not know.

Q. Do you know whether or not Nelson takes calls or renders any service for them?

A. Yes, we take all of Blue Line's calls at our Woonsocket terminal. Whether it's actually listed in the book, I have no knowledge.

Q. Do you know whether or not Blue Line has an employee stationed at Woonsocket in the terminal?

A. I have been over there many times and many times there have been Blue Line men there. Whether they are specifically stationed there, I don't know.

Q. You made reference to the Byrnes transaction in reply to a question of Mr. Barrett, and prior to negotiating the Byrnes transaction had Nelson negotiated another purchase which was the subject of an application before the Interstate Commerce Commission?

A. Yes, we had, and the other company involved, its name was White's; I believe it was White's Express, Incorporated of New Jersey.

[fol. 685] Q. Do you know the docket number in reference to the case?

A. No, I do not.

Q. Do you recall whether it would have been L. Nelson Purchase of White's Express?

A. That sounds about the way it was written.

Q. What action—

Mr. Barrett: How do you spell that transferor?

Miss Kelley: White's Express.

By Miss Kelley:

Q. What action was taken by the Interstate Commerce Commission on that application?

A. That was denied.

Q. And can you tell us whether the area involved in the proposed White purchase was the same or different than the area involved in the Byrnes purchase?

A. Generally speaking it was pretty much the same, although as I recall it went considerably further south than the Byrnes certificate covers.

Miss Kelley: I have no further questions.

Exam. Baumgartner: Mr. Mueller?

Recross examination.

By Mr. Mueller:

Q. I'd like to ask a couple of questions regarding this Showalter interchange, Mr. Chilberg. Does Showalter's mileage from the interchange point, which I understood you to say would be Philadelphia—

A. Correct.

[fol. 686] Q. —vary under this 65-35 arrangement which you have?

A. Yes, it does in that there are a number of miles in the area that he covers.

Q. And would those miles be similarly distant from Philadelphia or equal distance from Philadelphia, or would the distances vary?

A. Frankly, I have never checked the distance. I do know they vary, but again in that case it was an agreement between us as to a stabilized percentage of the revenue.

Q. You can't tell us anything about how long the haul is Showalter performs?

A. No, I can't. As a matter of fact, I was trying very hard to think of that name of the area I was referring to this morning, but it is in the Pennsylvania area. It seems like it's northern, north of Philadelphia.

Q. Whose equipment would be used in those interchanges? That is to say, is the interchange performed by means of leased equipment?

A. No, it's performed by means of interchange of trailer.

and by that I mean in cases of full load—or it would be handled interchange of trailer; less than truckload would be transferred directly to his unit.

Q. Would that be transferred on your dock or his?

A. That's correct.

Q. On your dock?

[fol. 687] A. That's correct.

Q. And you said that Nelson did the billing?

A. That is right.

Mr. Mueller: That is all, Mr. Examiner.

Exam. Baumgartner: May I ask just one question:

Are those shipments handled with Showalter prepaid shipments?

The Witness: When they are traveling northbound they would be prepaid; when they are traveling southbound they would be collect. In other words, this company pays the freight.

Exam. Baumgartner: The consignee pays the freight?

The Witness: On southbound.

Exam. Baumgartner: On southbound he pays the freight, and northbound he also pays, the same man?

The Witness: The same man pays.

Exam. Baumgartner: The same shipper pays the freight in both directions?

The Witness: Correct.

By Mr. Barrett:

Q. On redirect examination there was some conversation about Mr. Kashady. Do you recall that?

A. I do recall that, yes.

Q. Do you know how long he has been employed by Gilbertville?

A. I would estimate it to be approximately two years.

Q. Was he ever employed by Nelson?

A. Yes, he was.

[fol. 688] Q. Prior to that two years ago?

A. Correct.

Q. In what capacity was he employed in Nelson's?

A. He was employed as a driver.

Q. Do you know how long he was with Nelson as a driver?

A. Definitely, as to a definite time, I don't.

Q. For several years or more?

A. Yes, it was several years or more.

Q. And by about approximately two years ago, you're bringing it back to sometime in the middle of 1954?

A. Or thereabouts, yes.

Q. Now in relation to shippers for whom your company provides service at Pittsfield, there were comparisons between one principal account there as against another two or three. Do you recall that?

A. Yes, sir.

Q. Approximately percentagewise as against your company's gross revenue for any given period, we'll say the year of 1955, which is approximately \$924,000, how much of that is involved for that one principal account in Pittsfield?

A. Unless I am forced to say, Mr. Barrett, I would rather not answer because I think by my answering that information, it could be determined who that account is.

Miss Kelley: Mr. Examiner, may I inquire if Mr. Chilberg's position is that it's confidential information that [fol. 689] would affect his company.

The Witness: That's exactly right.

Exam. Baumgartner: Do you insist on that answer, Mr. Barrett?

Mr. Barrett: Well, obviously I don't desire to have the witness disclose any of the company's confidential information. However, on redirect examination there were quite a few comparisons made between relationship of traffic handled for this one shipper that's identified as the principal account and somebody else. I will let the record stand leaving any comparisons meaningless. We don't have anything to base it on. It could have been a dollar's worth of business a year; it could be a hundred thousand. We don't know; but if the witness has some other way he could indicate it, I will ask him.

By Mr. Barrett:

Q. Do you have any other way you could indicate some relationship of volume of traffic for this Pittsfield account?

A. No, I don't.

Q. By number of times served a week or month, would that or could you give us that?

A. It's virtually a daily operation.

Q. At the present time is the traffic to and from this Pittsfield account being interchanged with Gilbertville?

A. Yes, it is.

Q. Is the traffic to or from the two or three other ship-
[fol. 690] pers in Pittsfield interchanged with Gilbertville?

A. Not always.

Q. Predominantly?

A. No, I wouldn't say predominantly. I wouldn't be able to say whether it would be predominantly or not. I know that we transfer considerable freight destined to the Pittsfield area with other carriers.

Q. Will you identify a couple of representative ones?

A. Carriers?

Q. Yes.

A. Salem Brothers, primarily Salem Brothers.

Q. Any others?

A. We have on occasion transferred freight for that area to J. J. Sullivan. That is all I can recall at the moment.

Q. Now the traffic to the one principal account that you have referred to, is that traffic routed or unrouted, if you know?

A. That, I believe, is primarily routed.

Q. And shipped by your line, I presume?

A. Yes, sir.

Q. Is the traffic you interchange with other carriers, particularly Salem Brothers and J. J. Sullivan, routed or unrouted?

A. Both routed and unrouted.

Q. On any routed traffic are either of those carriers, Salem Brothers or—strike that.

[fol. 691] On any of those other Pittsfield movements, does the shipping routing call for either Sullivan or Salem Brothers?

A. You mean either or?

Q. I mean either one of them.

A. I see. It would show; if it was going to be routed Salem, it would show Salem.

Q. Do you know whether or not any does show Salem?

A. Oh, yes.

Q. Do you know whether or not some traffic shows Sullivan?

A. Sullivan, that's correct.

Q. So then your company ships that way when their name is shown on the shipper's routing, is that correct, or the consignee's routing, is that correct?

A. I don't think I follow you.

Q. If their name is shown, either Sullivan or Salem, and your company has the freight, would it go on the shipper's routing and turn it over?

A. Every time.

Q. Now you have drawn some comparisons between the interline arrangements you have with this Showalter as far as division of revenue is concerned and that which you have with Gilbertville, correct?

A. Correct.

Q. What's the normal practice of your company as far as division of revenue is concerned with interline carriers? [fol. 692] A. The normal practice is a division of the revenue on a mileage basis by the two carriers carrying the freight.

Q. So the record will be clear on that, assuming that you haul the freight 200 miles and the other carrier 200 miles, that would be 50-50?

A. Correct.

Q. And proportionately when over or under for each of you the division of rate would increase or decrease?

A. That is right.

Q. Now you testified regarding some of the telephone bill that was paid by Gilbertville for the use of the phones.

A. I did.

Q. And that was \$400 that was their share.

A. That is right.

Q. Per month.

A. Correct.

Q. Do you know what the total telephone bill per month is?

A. The total telephone bill is in the vicinity of \$1100.

Mr. Mueller: For clarification, for what period is that?
The Witness: Per month.

By Mr. Barrett:

Q. And I presume that covers all of the terminals collectively including Philadelphia and New Jersey?

A. You mean the \$1100?

Q. Yes.

A. That's right.

[fol. 698] Exam. Baumgartner: There being no objection, Exhibit No. 24 is accepted into evidence.

(The document heretofore marked as Applicant's Exhibit No. 24, Witness Chilberg, was received in evidence.)

Exam. Baumgartner: The witness was excused subject to further call, I think, by Miss Kelley, or by any of the parties for that matter.

We'll take a recess until 2:25.

(Short recess.)

Exam. Baumgartner: On the record.

KENNETH A. H. NELSON was sworn and testified as follows:

Direct examination.

By Miss Kelley:

Q. May we have your name, address.

A. Kenneth A. H. Nelson, 32 Earl Street, Manchester, Connecticut.

Q. And are you the stockholder of the Gilbertville Trucking Company who entered into the agreement which is the subject of this hearing?

A. Yes.

Q. Are you the holder of all the stock of Gilbertville?

[fol. 699] A. I control all 100 shares, all 100 shares.

Q. And so far as Mr. Kashady and Mrs. Nelson, your wife, are concerned, did they pay any consideration for the 24 shares each which they hold?

A. No.

Q. Now under the laws of what state was Gilbertville Trucking Company organized?

A. Massachusetts.

Q. Does it have a place of business in Massachusetts?

A. Yes.

Q. And what's the street address and the town?

A. Gilbertville Trucking Company, Incorporated, Hardwick Road, Gilbertville, Mass.

Q. Is that the address that's recorded with the Corporation Department of Massachusetts?

A. Yes, I believe so.

Q. Is that the mailing address, legal address of the company?

A. That's everything.

Q. Where are the principal transportation records, for example, waybills and the bookkeeping records of the company, maintained?

A. At Ellington, Connecticut.

Q. And how long have they been at Ellington?

A. Since approximately the middle of 1954.

Q. Prior to that date where had that work been done?
[fol. 700] A. Gilbertville, Mass.

Q. Why do you continue the mailing address of the Gilbertville Trucking Company as Gilbertville, Mass., if your records and your office work is done in Connecticut?

A. Well, I want to preserve the corporate identity of the company. It has real value from a business standpoint.

Q. What do you mean by that?

A. Well, the people in the area recognize the Gilbertville Trucking Company as more or less being their company. It's identified in the locale.

Q. Can you explain why or what effect a different address would have on the Connecticut address for example?

A. It would be silly in the first place to call it the Gilbertville Trucking Company, Ellington, Connecticut, and it would confuse people and it might result in loss of business.

Q. And is that why you have maintained the mail address, so forth, at Gilbertville, Mass.?

A. Basically that's the reason.

Q. As a Massachusetts corporation where are the corporate records, that would be the bylaws and seals, the seal and so forth, kept?

A. As a general rule they are kept at the office of my attorney, who, incidentally, is Secretary-Clerk at Springfield. His name is Arthur Paroshinsky.

Exam. Baumgartner: Where is he?
[fol. 701] The Witness: He's in Springfield, right on the main street.

By Miss Kelley:

Q. Do you know whether or not it is a requirement of a Massachusetts corporation that such records be maintained in Massachusetts?

A. You mean the corporate records?

Q. Yes, the bylaws and certificates.

A. I believe so.

Q. Did you consult with any representative of the Interstate Commerce Commission with reference to changing of the office records of Gilbertville Trucking Company to Ellington, Connecticut?

A. Yes, I did.

Q. Who did you consult?

A. I consulted with Mr. Dean Noble of the—I don't know what district it is, but he is located at Hartford, Connecticut.

Exam. Baumgartner: You mean by changing the records, changing the location of the transportation records and bookkeeping books from Gilbertville to Ellington?

The Witness: That is correct.

Miss Kelley: Thank you, Mr. Examiner.

By Miss Kelley:

Q. Will you describe the facilities maintained at Gilbertville, Mass., by the Gilbertville Trucking Company?

A. Yes. It's a steel building we are located in. There's storage facilities there, limited storage facilities, and a good-sized yard.

[fol. 702] Mr. Barrett: Good-sized what?

The Witness: Good-sized yard, y-a-r-d.

Mr. Barrett: Thank you.

By Miss Kelley:

Q. And you have a representative of the company at Gilbertville?

A. Yes, I do.

Q. Have you heard the testimony as to location of the other terminals of the Gilbertville Trucking Company referred to in Mr. Solomon's testimony and Mr. Chilberg's testimony?

A. Yes.

Q. Have the terminals been correctly described on this record?

A. I believe they have.

Q. And have you prepared an exhibit showing the equipment operated by the Gilbertville Trucking Company as of July 31, 1956?

A. I didn't get that question.

Q. Have you prepared an exhibit showing the equipment of Gilbertville?

A. I have caused to be prepared an exhibit.

Miss Kelley: Mr. Examiner, I offer the exhibit headed, "Gilbertville Trucking Company, Incorporated, Equipment Operated by Gilbertville as of July 31, 1956."

Exam. Baumgartner: That will be Exhibit No. 25 for identification.

(The document above referred to as Applicant's Exhibit No. 25, Witness Nelson, was marked for identification.)

[fol. 703] By Miss Kelley:

Q. Do you have equipment stationed at your various terminals?

A. Yes, I do.

Q. And where is the bulk of the equipment garaged or headquartered?

A. Well, there is equipment located at each one of the terminals. I'd have to consult with notes in order to give it to you.

Q. Well, I don't think that's necessary. But is the majority of it—do you have a limited amount of equipment at each terminal and the majority at one particular place or two places?

A. Yes.

Q. Can you tell us where the majority is?

A. The majority is probably at Rockville—we'd better straighten that Rockville-Ellington business out now. I think it's been made clear that all my life I have referred to Rockville as Ellington. We get our mail at Rockville, and if you tell people that you live in Ellington they don't know what you're talking about. Rockville is a city.

Exam. Baumgartner: For our purpose Rockville and Ellington are the same.

The Witness: Good enough for me.

Exam. Baumgartner: When you say you maintain the majority of your equipment at Ellington, is that what you mean, a majority of it?

[fol. 704] The Witness: That's right.

Exam. Baumgartner: Or the larger portion in comparison?

The Witness: Yes, that's right.

Exam. Baumgartner: You mean you maintain over 50 per cent of it at Ellington?

The Witness: No, I wouldn't say that.

Exam. Baumgartner: That's what majority means, doesn't it?

By Miss Kelley:

Q. Do you want to look at your notes and break it down and tell us how many units are stationed at each terminal?

A. Yes. Should I proceed?

Q. Yes.

A. At Rockville there are 4 straight trucks and 6 tractors and one trailer. You want me to give you the whole breakdown now?

Q. Yes.

A. At Gilbertville there's one straight truck and 2 tractors and 2 trailers. At Woonsocket, Rhode Island there are three straight trucks and 2 tractors and 2 trailers. At New-

ton, Massachusetts, there are 2 straight trucks, 2 tractors and 2 trailers. At Monson, Massachusetts, we maintain one trailer. There is no terminal there, but we have a trailer spotted there. At New York we have 5 straight trucks.

Exam. Baumgartner: How many tractors did you say at Gilbertville?

The Witness: At Gilbertville, tractors, one.
[fol. 705]. Exam. Baumgartner: One?

The Witness: Wait a minute, hold it now. I meant to say one straight and 2 tractors.

Exam. Baumgartner: 2 tractors and 2 trailers?

The Witness: Yes, that's right.

By Miss Kelley:

Q. Now will you refer to a copy of the application. Does Exhibit B attached thereto describe the operating authority of the Gilbertville Trucking Company?

A. Yes, it looks just like it.

Exam. Baumgartner: Exhibit B?

Miss Kelley: Yes, sir.

By Miss Kelley:

Q. Now will you tell us generally what type of service your company renders under your certificate. That is in point of time and particular areas within the certificate operations are conducted.

A. Well, it's basically an irregular route operation. We go when we are called. When a customer calls, we make the pick-up.

Q. As far as service is concerned, do you give same-day, overnight, or what?

A. Oh, we give overnight service.

Q. Do you render service, for example, between Massachusetts points and points in Rhode Island?

A. Massachusetts points and points in Rhode Island?

Q. Yes.

A. Yes.

[fol. 706] Q. As well as between Massachusetts points and points in Connecticut?

A. That's right.

Q. Now in all instances would service between points in Massachusetts and points in Rhode Island or points in Connecticut and points in Massachusetts be an overnight service?

A. Yes, it would.

Q. Now do you interchange traffic?

A. What was that question?

Q. Does your company interchange traffic?

A. Yes, it does.

Q. And approximately how many carriers do you interchange with?

A. Well, I checked it and we interchange with about 50 carriers.

Q. Can you break the 50 carriers down and tell us approximately how many you interchange with, say at New York, how many at Massachusetts, then Rhode Island, or Connecticut points?

A. Well, I would say that I didn't really break it down into that category. I'd say it's about even-stein, 25 in New York and 25 up on this end, in Massachusetts end.

Q. Among those carriers do you interchange with the L. Nelson & Sons?

A. Yes, I do.

Q. Can you tell us what per cent of the dollar value or the volume of tonnage of the Gilbertville Trucking Company [fol. 707] is represented by the interchange with L. Nelson & Sons?

A. I would say it would run around 5 per cent probably.

Exam. Baumgartner: 5 per cent?

The Witness: 5 per cent of business I do.

Exam. Baumgartner: Tonnagewise?

The Witness: No, I think dollar, speaking in terms of dollars.

By Miss Kelley:

Q. Do you also interchange traffic with the R. A. Byrnes?

A. Yes, I do.

Q. And where is the interchange with Byrnes effected?

A. At New York, New York.

Q. And what percentage of your total traffic is interchanged with Byrnes?

A. Well, now, to be perfectly honest with you I didn't really check it, but I would estimate, and it would be fairly close anyway, oh, perhaps 4 to 5 per cent, maybe, similar to the traffic that—business that we do with Nelson, maybe a little less or more one way or the other.

Mr. Barrett: Once again you're talking about revenue?

The Witness: Oh, yes, talking about dollars.

By Miss Kelley:

Q. Now did you hear Mr. Chilberg's testimony as to the 60-40 arrangement between Gilbertville and Nelson for the split of the revenue?

A. Yes.

[fol. 708] Q. Do you have a similar arrangement with other carriers?

A. Yes, I do. I have similar arrangements with three other carriers that I can think of offhand. You mean now—we are speaking about a fixed percentage division?

Q. That's right.

A. Yes. I have that arrangement with three other carriers that I can think of offhand.

Q. And what arrangement do you have with the balance of the carriers that you interchange traffic with?

A. It's on a pro rata basis which means in effect that if a carrier hauls 50 miles and you haul 50 miles, you split it down the middle.

Q. Why do you have a pro rata arrangement per shipment with some carriers and then you have this flat arrangement with other carriers?

A. Well, it depends a whole lot on this situation. Now a strict north-south movement—strike north-south movement—is the pro rata arrangement is the best; but if the movement is, there is any back-haul involved in the movement, it doesn't necessarily work out to the best advantage.

Q. I'm sorry; I can't follow you on that. Could you break it down a little different as to what you mean by a north-

south. Does the frequency with which you interchange with a carrier have something to do with it?

A. Yes, that has a lot to do with it too. If you're inter- [fol. 709] changing very frequently it does take time and money to pro rate a shipment as against a fixed split where you just simply know what the division of revenue is going to be right then and there without consulting charts and so on.

Q. Now is your interchange with Nelson or Gilbertville's interchange with Nelson any different than your interchange with other carriers?

A. Would you give me that question again.

Q. Is the physical interchanging of the freight between Nelson and Gilbertville any different than your interchange of freight between other carriers and Gilbertville?

A. No.

Q. Now, does Exhibit B-7 attached to the application represent shipments transported by your company, Gilbertville Trucking Company, during the period of March and April of 1955?

A. Say that again, please.

Miss Kelley: Can we have it read, please.

(Question read.)

The Witness: Yes.

By Miss Kelley:

Q. I should say in that, the month of March, 1955 and the month of April, 1955. Do you know what per cent of the shipments handled during March of 1955 are reflected in this exhibit?

A. As I recollect it's almost 100 per cent.

Q. Were duplications eliminated in preparation of the exhibit?

[fol. 710] A. That's right, that's true.

Q. With respect to at least elimination of at least some duplications, I looked down here and I saw a duplication. Do you recall approximately how many waybills for the month were eliminated, either in numbers or percentage, as to those we used?

A. Yes. Now that you put it that way I do recall that approximately a quarter of the batch that is represented by this period was eliminated because of duplications.

Q. And does that apply to May as well as March?

A. Yes, it would apply to both months.

Exam. Baumgartner: When you refer to May of 1955, as also shown in the same exhibit?

Miss Kelley: That's correct.

Mr. Barrett: Mr. Examiner, up until this time I have only heard that that exhibit covers March and April.

Exam. Baumgartner: Well, the exhibit itself says March and May.

Miss Kelley: I'm sorry; it's the fifth month and that would be March and May.

Mr. Mueller: While we are inquiring, the copy that I have had in the second column of Page 1 under the heading date just the figure 195: Should that be 1955?

Miss Kelley: That's correct.

By Miss Kelley:

Q. Now did you cause to be prepared an exhibit showing representative shipments transported by Gilbertville [fol. 711] Trucking Company during the two-week period between May 1, 1956 and May—although there are four shipments shown for May 14 to May 17, actually it covers the period from May 1 to May 11, doesn't it?

A. Yes, I caused to have this prepared.

Miss Kelley: I offer this for identification.

Exam. Baumgartner: That will be marked Applicant's Exhibit No. 26 for identification.)

(The document above referred to as Applicant's Exhibit No. 26, Witness Nelson, was marked for identification.)

By Miss Kelley:

Q. Will you tell us whether or not in your opinion Exhibit B-7 plus Exhibit 26 as introduced is fairly representative of the operations of your company during the past year or two years?

A. You mean—the B-7 was the one that was—

Q. Attached to the application.

A. Yes.

Q. Let me revise that and say in your opinion is Exhibit B-7 plus Exhibit 24—

Exam. Baumgartner: 26.

By Miss Kelley:

Q. —26, excuse me, fairly representative of the operations of your company during the entire period from March 1 of 1955 through or up to the present time?

A. Yes. Excuse me for a second. Now what's that last exhibit? It's marked wrong here.

[fol. 712] Q. 26. Do you have the underlying documents from which these two exhibits were prepared in the hearing room?

A. Yes, I have.

Miss Kelley: I was going to ask if the witness would please refrain from answering until I had completed my question because it's very difficult. My question was whether or not he had the underlying documents from which these exhibits were prepared present in the hearing room.

The Witness: Yes, I do have those.

By Miss Kelley:

Q. Do you know what per cent Exhibit 26 represents of the entire shipments during the period May 1 through May 11, 1956?

A. Yes. There again about 25 per cent was eliminated because of duplication.

Mr. Barrett: Mr. Examiner, may I ask a question for clarification while we are on those percentages?

Miss Kelley: Yes.

Mr. Barrett: Does that mean that approximately 75 per cent of the shipments are shown in the respective exhibits?

Miss Kelley: Yes.

The Witness: Yes.

Exam. Baumgartner: 75 per cent of the shipments are shown?

The Witness: Yes.

Exam. Baumgartner: I'm confused. Where is the duplication with respect to the 25 per cent?

[fol. 713] The Witness: It would be actually the same type of shipment moving between the same points.

Exam. Baumgartner: But between different shippers?

The Witness: No, no, same thing.

Miss Kelley: Mr. Examiner, in preparing the exhibit what we attempted to do, and we didn't eliminate them all as I see, but what we attempted to do, shipments of the same commodity moving between the same points on the same day, regardless of the shipper, we tried to eliminate them or in some instances if it seemed there were a great many shipments regardless of commodity moving between the same two points, but we just picked a representative number of them. Frankly, we pulled them out until we got a little tired as far as that point was concerned.

Exam. Baumgartner: These documents show 75 per cent of the shipments that actually moved?

Miss Kelley: Yes.

Exam. Baumgartner: Approximately?

Miss Kelley: Yes, I think that's approximately right.

By Miss Kelley:

Q. Now, does Gilbertville hold itself out to transport traffic as tended to it?

A. Yes, indeed.

Q. Does it advertise its business?

A. Yes, it does.

Q. What mediums do you use for advertising?

A. Well, we use several. These are what I can think of [fol. 714] offhand: In the telephone book; in the Motor Carrier Guide; we use blotters; we use pocket protectors that I've got on here now.

Q. Those are the principal methods?

A. Principally speaking, yes.

Q. How many employees does Gilbertville have?

A. 53.

Q. And can you break that down into drivers, office help, etc.?

A. Yes, I'd have to consult my memorandum. Is that permissible?

Q. Yes. You don't have to request permission. .

A. Oh, wait a minute, now. I said 53. I should have said 53 drivers, 4 terminal managers, 3 dispatchers, and 10 office people, and one mechanic, which makes a total of 71. I think that's right, 71.

Q. Where are the terminal managers located?

A. The terminal managers are located in New York, Gilbertville, Woonsocket, and Newton.

Q. Where are the dispatchers employed?

A. Rockville and New York.

Q. Is it your understanding that the employees are to be retained if this transaction is approved by the Commission?

A. Yes.

Q. Now I note in your financial statement that is shown that you have acquired some land in Springfield.

A. That is right.

[fol. 715] Q. Has Gilbertville Trucking Company made any use of that land up to the present time?

A. No, not at present.

Q. Did you participate in the conferences involving the economies which are anticipated would result from this transaction?

A. Yes.

Q. And did you assist in the furnishing of the supplemental data which was incorporated into Exhibit 11 showing economies?

A. I don't have Exhibit 11. Yes.

Q. Do you have anything to add to the testimony which has already been offered as to any other economies that might be anticipated if these operations are merged?

A. I can't think of any offhand.

Q. What is your understanding as to the agreement to exchange the Gilbertville stock for stock of Nelson?

A. Would you repeat that.

Q. What is your understanding as to the provisions of the agreement between the L. Nelson & Sons Company and yourself for the conversion or substitution of the stock of Gilbertville for the stock of Nelson if this transaction is approved?

A. Well, I don't think I quite get that. Do you want me to explain it?

Q. Let me withdraw that. Will you explain your understanding of the agreement between the parties in this transaction?

[fol. 716] A. Yes. The agreement is based on the book values of both companies, and the ratio between my company and their company is the basis for the ultimate—or at least—wait a minute now. Let's get this straight. The book value ratio at the time that this thing is wound up.

Q. If approved by the Commission?

A. If approved by the Commission. The book value ratio at the time that this thing is wound up will be the basis for the share that I will get in the Nelson Company as it were.

Q. Do you understand—

A. I hope I made that clear.

Q. Do you understand that the computation will be made on the basis of book value of Nelson also?

A. That's right.

Q. Now, will you tell us what led up to the negotiating of this transaction. I mean what caused you to negotiate this transaction?

A. Yes. Mr. Solomon, as you know, is my accountant, and he spoke to me on several occasions relative to the possibility of merging the Gilbertville Company with the Nelson Company. He happens to be the accountant for the Nelson Company as well. I have actually had, since I took over the business, difficulty with capital. I have been short on capital ever since I have been operating the company, and as you know capital is a big factor in operating a transportation company.

[fol. 718] The Witness: Yes. The possibility that leasing may no longer be permitted by the Commission on a trip basis, that is on a sort of a temporary basis, has been a very big factor. I might say in the way of explanation that after having talked with Mr. Solomon, and upon his suggestion I talked with my counsel who suggested to me that I purchase equipment in the light of the fact that there was a possibility that these leasing rules may be revised so that we won't be permitted to lease equipment.

Exam. Baumgartner: That you won't be permitted to lease?

The Witness: On a temporary basis or on a trip basis.

By Miss Kelley:

Q. And did you buy equipment as you say, to eliminate—did you buy additional equipment on my recommendation?

A. I bought as much equipment as I could stand financially. I purchased all I could swing, let's say.

[fol. 719] Q. If this transaction is not approved, do you have a plan for the future with respect to equipment? I mean leasing equipment as against purchasing equipment?

A. No, frankly, I don't.

Q. Will you tell us what you consider would be the benefits to the shipping public if this transaction is approved?

Mr. Barrett: Before he answers that question, may I have the question read?

Exam. Baumgartner: Will you please read the question?

(Question read.)

Mr. Barrett: I object on the grounds that that's a conclusion of the Commission to arrive at.

Exam. Baumgartner: My ruling will be as it was before, that the witness may answer.

The Witness: The big factor I feel that the shipping public will gain will be, number one, I think they will get a financially healthier company out of it; they will get better service; their claims will be settled faster; and in general it will be a sounder company all the way around.

Miss Kelley: I release Mr. Nelson for cross-examination.

Exam. Baumgartner: Mr. Mueller, you may proceed on cross-examination.

Cross examination.

By Mr. Mueller:

Q. Mr. Nelson, you stated, as I understood you, that you control all 100 shares of the stock of the Gilbertville [fol. 720] Company. I would like to have you explain just

what you mean by that in the light of the fact that exhibits and testimony heretofore offered indicate that certain shares have been issued to your wife and to a man by the name of Kashady.

A. Right. Yes, I control the entire 100 shares. First of all, the share of stock that is held by Mr. Paroshinsky, my attorney, is simply a qualifying share. The 24 shares that John Kashady holds is actually in the same token qualifying shares, and I can explain it in this fashion: That Mr. Kashady was my personal representative in the Gilbertville area; he had to deal with all of the problems in connection with the company, and in order that his decisions and his instructions and orders in contact with the labor unions and so on had any weight, I wanted him to hold stock for prestige, and that's exactly why it was done.

Q. Did you ever issue a stock certificate to him, or did he ever have a stock certificate in his possession?

A. Yes, he did.

Q. Does he have it in his possession now?

A. No, he doesn't.

Q. Who does?

A. I do.

Q. Do you also hold possession of the certificate issued to the attorney, Paroshinsky?

[fol. 721] A. No, I don't.

Q. What about your wife?

A. Well—

Q. What about your wife's certificate?

A. Those 24 certificates are available any time I want them, yes.

Q. You do control them all?

A. Yes, indeed.

Exam. Baumgartner: Now wait a minute. I'm a little offtrack here. There's 100 shares outstanding of which Paroshinsky has one, Kashady has 24, and your wife has how many?

The Witness: 24.

Exam. Baumgartner: 24 also?

The Witness: That's right.

Exam. Baumgartner: That would be 49, and the other 51 are in your name?

The Witness: Yes.

By Mr. Mueller:

Q. Whatever the arrangements are, they are such that you're able to deliver 100 shares?

A. That is right.

Q. To the Nelson interests in the event this transaction is approved?

A. That is right.

Q. Could you give us a little more adequate description of these premises at Gilbertville? You said it was a steel [fol. 722] building, I believe.

A. Yes.

Exam. Baumgartner: Mr. Mueller, do you mind if I inject a question at this point concerning shares while we are on the subject?

Mr. Mueller: No, sir.

Exam. Baumgartner: Do you mind?

Miss Kelley: I don't have any objection, no.

Exam. Baumgartner: If this transaction is consummated, will any shares of the Nelson Company be issued to Mr. Kashady for the 24 that stand in his name?

The Witness: No.

Exam. Baumgartner: Will Nelson Company shares be issued to your wife for the 24 shares in her name?

The Witness: No.

Exam. Baumgartner: And the same is true of the one share held by Mr. Paroshinsky?

The Witness: That's correct.

Exam. Baumgartner: In other words, I take it you're the owner of the whole 100 shares?

The Witness: That's right.

Exam. Baumgartner: And you will receive all of the shares of the Nelson Company that are issued in exchange for the 100 shares of Gilbertville?

The Witness: That's correct; that's absolutely right.

[fol. 723] By Mr. Mueller:

Q. Does the stock record book of the company reflect your—perhaps I should call it “beneficial” interest in the

shares held in the name of your wife, Kashady, and Paroshinsky?

A. I don't know what you're talking about. I don't quite understand what you're driving at to tell you the truth.

Q. Is there any indication in the books of the company, the records of the company, which would reveal your right to the possession of the stock held by these other individuals?

A. The records indicate that I hold 51 shares and that John Kashady holds 24, my wife holds 24 and Paroshinsky holds the other.

Exam. Baumgartner: Do the stock record books in any manner indicate that the 49 shares issued to these other folks are being held in trust for you?

The Witness: Well, actually they have been signed over to me.

Exam. Baumgartner: Subsequent to their issuance to these other holders they were then assigned to you, is that right?

The Witness: That's right.

Exam. Baumgartner: But the assignment has not been reflected upon the books of the corporation?

The Witness: That is correct.

Mr. Mueller: Has the Examiner concluded?

Exam. Baumgartner: I'm through for the time being.
[fol. 724] Excuse me, and thank you, sir.

By Mr. Mueller:

Q. We were discussing the premises at Gilbertville. What sort of building is this?

A. It's a corrugated steel building.

Q. Was it at sometime used for some other purpose, if you know?

A. Yes, I believe an airport.

Q. And would that be the Ware Airport that we are discussing here?

A. Beats me what airport it is. I don't know. I rent it from a fellow by the name of Edgar Rickard.

Q. Is this a location out in the country so to speak?

A. It's out in the sticks.

Q. Are there other things on Hardwick Road?

A. It's out in the sticks.

Q. Homes?

Miss Kelley: I object. What's the materiality of whether there are homes or not?

The Witness: It's out in the sticks. There's no question about that.

Exam. Baumgartner: Meaning it's out in the country somewhere?

The Witness: That's about the size of it. We call it the sticks. When you get that far out in the country we call it the sticks.

[fol. 725] By Mr. Mueller:

Q. You have referred to the locality of this terminal at Gilbertville as being the company's post office or mailing address, is that correct?

A. That's right, it's our main office for all practical purposes.

Q. Do you also have a post office box somewhere which you use for business purposes?

A. Right in the center of town is the post office and that's where we get our mail. We fetch it right from the post office.

Q. And that would be the Gilbertville Post Office?

A. That's right.

Q. Now do I correctly understand you that the corporation's certificate of incorporation and its bylaws are not kept at the premises at Ellington or Rockville, Connecticut, but they are kept at some other point?

A. Yes. They are kept ordinarily at my attorney's office in Springfield, and I gave you his name before. Now, let me qualify that in saying this: I have had the minute book down to Ellington on occasion for stenographic reasons, but that's all. It's basically kept in Springfield at my attorney's office.

[fol. 726]

By Mr. Mueller:

Q. I do not recall whether or not you told us, Mr. Nelson, the source of the figures shown on Exhibit No. 25 that is the equipment operated by Gilbertville as of July 31, 1955.

Exam. Baumgartner: 1956, isn't it?

Mr. Mueller: 1956, I believe it was, yes.

The Witness: What was your question.

By Mr. Mueller:

Q. The source of those figures.

A. They're my figures.

Q. Taken from the corporation records?

A. Yes, indeed.

Q. And does the corporation in the Ellington office maintain so-called equipment lists?

A. Yes, we maintain equipment lists and all information pertaining to the equipment.

[fol. 728] Q. Do you have in the office of the Gilbertville Trucking Company, Ellington, Connecticut, any list of equipment which is available to the Gilbertville Trucking Company for use in addition to the list of equipment which you have shown here on Exhibit No. 25.

[fol. 729] The Witness: Well, we do, Gilbertville Trucking Company does have a list of vehicles that are owned by the L. Nelson & Sons Transportation Company, and that list contains the information pertaining to the engine number and so on.

By Mr. Mueller:

Q. And if you know whether or not that list embraces all of the motor vehicle equipment owned and operated by the L. Nelson & Sons Transportation Company?

A. I'm pretty sure that it does, yes.

Q. Now, in conjunction with your testimony concerning the locality of the equipment owned by Gilbertville Trucking Company, you mentioned one trailer, Monson, Massa-

chusetts. Will you tell us exactly where in Monson this vehicle is stationed or kept?

A. Well, I will tell you. I don't know the street, frankly, but I will tell you by landmarks. You go into Monson until you come to the watering trough and you turn right and go down the street, and when you see a trailer that's it.

Q. Is this a parking lot or on the street?

[fol. 730] A. It's a parking lot. It's on an open lot, just an open lot.

Exam. Baumgartner: Vacant lot?

The Witness: Vacant lot is right.

By Mr. Mueller:

Q. Is there any other building?

A. It's a vacant lot.

Q. You have no office there?

A. No office there.

Q. You maintain no records there?

A. We maintain no records there.

Q. No employees are stationed there?

A. No, there are no employees stationed there excepting when they're transferring freight.

Q. Is this a community, a place called Monson?

A. I assume it is.

Q. Is it east or west of a place called Palmer, if you know?

A. South.

Q. Directly south?

A. Well, I'd say south. I'd say south from my recollection.

Q. Would that be north or south of Route 20?

A. Well, it would be—Route 20, where does that go through?

Q. I have no objection to your looking at a map.

A. Route 20 goes through Palmer.

Exam. Baumgartner: Mr. Mueller says he doesn't object to your looking at a map.

The Witness: Monson, Mass., is south of Route 20. May- [fol. 731] be southeast to a slight extent, but basically south.

Q. Is this particular lot north or south of Route 20?

A. Well, if Monson is south of it it's got to be.

Q. It has to be what?

A. It has to be south of Route 20.

Q. Is it on a street or route?

Miss Kelley: I object. I can't see the materiality of stressing the point, Mr. Examiner.

Exam. Baumgartner: Off the record.

(Discussion off the record.)

Exam. Baumgartner: On the record.

By Mr. Mueller:

Q. Is that the best of your ability of establishing the location?

A. Yes, that's about the best I can do in establishing the location.

Q. On direct examination you referred to that part of the Gilbertville certificate which authorizes operations from Massachusetts to Rhode Island and Connecticut.

A. Right; correct.

Q. And in the event of origination of a shipment by Gilbertville at a point such as Newton, Massachusetts—

A. Yes.

Q. —how does Gilbertville operate to take such a shipment to Providence, Rhode Island?

A. Well, it would take the shipment from Newton and [fol. 732] it would either go into Gilbertville or it might go down to Ellington and from there it would go into Providence.

Q. And it would be handled all the way?

A. Overnight. It would be handled overnight. It would be handled, if Gilbertville originated the shipment and destined the shipment, it would be handled all the way Gilbertville, sure, and it would be overnight.

Q. And do you conduct such operations?

A. Yes, we do. Not too much of it, but some.

Q. Well, leaving that subject for a moment, I understood that Gilbertville interchanged with some 50 carriers. Is that your testimony?

A. That is right.

Q. Some 25 of them are located in New York and 25 in Massachusetts?

A. I said that more or less, 25 more or less on either end.

Q. Can you name the carriers with whom you interchange in Massachusetts?

A. Yes, I can. We interchange with Blue Line; we interchange with Gay's Express, Holmes, O'Brien, just about anybody that goes up to Maine and New Hampshire we interchange with.

Q. At what principal points would you interline with Blue Line, Gay's, Holmes?

A. Actually, Gay's most of the time is Springfield, sometimes Worcester or Boston. We also do an interchange with [fol. 733] Blue Line at Boston or Worcester, and, well; basically that would be the points at which interchange is made. That is with exception, now of the—I haven't mentioned the New York end of it. If you want a whole list of them, I think I could almost give you the New York end. I know I have a list.

Q. Would you interline a New York shipment, a shipment originated at Gilbertville at Springfield?

A. Say that again, please.

Q. Would you interline a shipment originating at New York with another carrier at Springfield, Massachusetts?

A. Yes, I might.

Q. Could you show us the authority for such an interline in your certificate? Let's take for example, Exhibit B-7 on Sheet 8. The sheets are not numbered. A shipment on Pro No. 13062 which appears to have originated at Brooklyn, New York have been interchanged at Springfield, and I assume that's Springfield, Massachusetts, and destined to Manchester, New Hampshire and consisted of some doors.

A. Now what was that question again?

Q. The question is as to the authority of Gilbertville which authorized that operation.

Exam. Baumgartner: You mean under which interchange is made at Springfield.

The Witness: Yes, I can give you that authority. It's under Certificate of Public Convenience and Necessity MC-87431.

[fol. 734] Q. At what point?

Miss Kelley: I'm objecting to these questions. Personally I can't see the point of it unless it's an attempt to trick the witness, Mr. Examiner, and which has no part of a finance proceeding.

Exam. Baumgartner: I think cross-examination may be conducted for the purpose of testing the knowledge of the witness with respect to the testimony he gave on direct examination. That isn't an attempt to trick the witness. It's an attempt to find out the extent of his knowledge of the matters concerning which he has testified.

By Mr. Mueller:

Q. Could you tell us how that particular shipment was handled, Mr. Nelson?

A. Yes, I can.

Exam. Baumgartner: Will you please tell me what sheet that is shown on?

Mr. Mueller: It's the eighth sheet.

Exam. Baumgartner: I want the sheet on which the shipment is shown. I have it now. Thank you. That's Pro No. 13062, Brooklyn to Manchester, doors, interchange at Springfield.

The Witness: Manchester, New Hampshire. There's two Manchesters.

Exam. Baumgartner: Yes, Manchester, New Hampshire, that's right.

The Witness: Now your question again, please.

[fol. 735] Exam. Baumgartner: He asked you how that shipment was handled.

The Witness: Yes: picked up in New York, went to Gilbertville, Massachusetts, which is part of the town of Hardwick, to Springfield, and thence by connecting line to Manchester.

By Mr. Mueller:

Q. And if I asked you a similar question concerning other shipments originating in the New York area which

are shown on this exhibit to be interchanged at Springfield, would your answer be similar?

A. That's right.

Q. Springfield was the point of interchange of that shipment to which we were addressing our previous question.

A. That's right, absolutely right. It says Springfield. I guess it must be right.

Q. And you have those underlying documents with you so that we can verify that statement if desired?

A. Yes.

Mr. Barrett: Excuse me, if you don't mind. Could we have a short recess? I have a call I'd like to make before four o'clock.

Exam. Baumgartner: We'll recess until four o'clock.

(Short recess.)

Exam. Baumgartner: Let's come to order, please.

Mr. Mueller, will you please continue.

By Mr. Mueller:

Q. Mr. Nelson, during the recess I examined Pro No. [fol. 736] 13062 which relates to the shipment from Brooklyn, New York via Springfield to Manchester, New Hampshire to which we were addressing ourselves before the recess, and I found nothing on that document which would indicate an operation providing a gateway that you suggested, namely, Gilbertville en route to Springfield, and I would like to ask you whether you have any other records which would show me that particular operation.

Miss Kelley: Well, I object to the question, Mr. Examiner. I don't know of any requirement under the Commission's regulations that on the shipping documents the routes traversed should be put down there.

Mr. Mueller: Frankly, I don't either, Miss Kelley, but I'm trying to ascertain whether there are other records in existence from which we might ascertain the facts which would lend credence to or perhaps disprove his allegations.

Exam. Baumgartner: I think, Miss Kelley, he sponsors this exhibit and he can be properly cross-examined on its contents.

You may answer.

The Witness: We operate the same as any other trucking company. We show the point of transfer on our pro and the point of origin as well as the destination, but that's all we show.

By Mr. Mueller:

Q. And I'm asking you in addition to the pro if you have any other records which would show the route of operation.

A. I don't know how I could prove that.

[fol. 737] Q. I'm not asking you how you could prove it. I'm asking you whether or not you have any other such record.

A. To prove it actually?

Q. To prove the actual route of operation.

A. There wouldn't be any way that I know of to prove that. I wouldn't have any way of proving it. You just have to take my word for it, that's about all.

Exam. Baumgartner: In other words, what you're saying is that you have got no record which would show that the shipment referred to moved through Gilbertville?

The Witness: That is right.

Exam. Baumgartner: Well, that's a simple answer.

By Mr. Mueller:

Q. Now, while we are on the subject of interchange, I understood you to give Miss Kelley a 5 per cent answer dollarwise as a comparison. I believe it was, of the interchanges between Gilbertville and L. Nelson as compared with the entire business of the Gilbertville Company. Was that the purport of that 5 per cent figure? If not will you please straighten me out.

Miss Kelley: May we have the question read?

The Witness: Yes, I'm not too sure about that.

Exam. Baumgartner: Will you please read it?

(Question read.)

The Witness: I'm no attorney, now. That's one of those fancy words—what did you say, "purport"?

Miss Kelley: Do you understand the question?
 [fol. 738] The Witness: Just rephrase it a little bit. I think I know what you mean but it would be easier for me to give you the correct answer.

By Mr. Mueller:

Q. Let's put it this way: Did I understand you to say that 5 per cent of all the business that Gilbertville does is interchange traffic with L. Nelson & Sons?

A. That's an approximate percentage, yes, sir.

Q. Now that comparison is of the interchange with Nelson with all of the business of Gilbertville, is that correct?

A. That's right, yes.

Q. Now, can you give us a comparison between the interchanges with Nelson as contrasted with the interchanges which Gilbertville does with all other carriers?

A. I have never really figured that out to be perfectly honest with you. It is a wise policy to figure that out—I mean just as operational procedure, but honestly I never did.

Q. Can you give us any approximation?

A. Well, I would say that the total transfer business, business that's turned over to other carriers would—this would be just a guess—I would say that it would be somewhere between 60 and 75 per cent would be local traffic, that is traffic originated and destined on my own line, and the 25 per cent would probably be the total turned over to other lines.

Q. Including L. Nelson?

A. Yes.

[fol. 739] Q. Now a proportion of that 25 per cent which is interchange business or interline business is done with L. Nelson?

A. I told you before that I think that about approximately 5 per cent of it—it would be between 25 and 30 per cent, let's say, and that's now a guess, would be interline traffic. Out of that figure, 5 per cent or thereabouts would be business interlined with Nelson in particular.

Exam. Baumgartner: In other words, one-fifth or one-sixth of all interline business that your company does is with the Nelson Company?

The Witness: Approximately.

By Mr. Mueller:

Q. Well, then, did I misunderstand the comparison which I stated at the outset of this series of questions, namely, that the 5 per cent figure was a comparison of the interline with L. Nelson with all of the traffic handled by Gilbertville?

A. When I said 5 per cent I meant 5 per cent of the business that is conducted by Gilbertville, all of the business.

Q. All of the business?

A. That is conducted by Gilbertville.

Q. Now when you tell the Examiner that the 5 per cent is of the 25 per cent interline business, then it isn't correct, is it?

A. No, no.

Miss Kelley: I object, because that's not proper characterization.

[fol. 740]. Mr. Mueller: I admit I think I'm being perhaps—

Exam. Baumgartner: He said that 5 per cent of his revenues were derived from interchange business with Nelson. He said that about 75 per cent of his revenues were derived from local business, that is business local to his line. Then he later said that about 25 to 30 per cent of his revenue was derived from interchange business with everybody, that is with all carriers.

Mr. Mueller: I follow it so far.

Exam. Baumgartner: So that must mean, it's a mere mathematical calculation that one-fifth or one-sixth of his interchange business is done with Nelson. It's a comparison between 5 per cent and 25 to 30 per cent, see?

Mr. Mueller: If that's the witness' answer, I'm satisfied.

Exam. Baumgartner: That's what I understood him to say.

The Witness: I'm satisfied if you are.

Exam. Baumgartner: It isn't a question of whether I'm satisfied or not. It's a question of whether your answer is accurate to the best of your knowledge.

The Witness: Yes, it is.

Mr. Mueller: Thank you, Mr. Examiner.

Mr. Barrett: Before we go off this, Mr. Examiner, I am not satisfied. I followed you up to the point where you said one-fifth of his business is interchanged with Nelson.

Exam. Baumgartner: One-fifth of his interchange business [fol. 741] is with Nelson.

Mr. Barrett: Oh, I didn't hear you put in the interchange.

Exam. Baumgartner: One-fifth to one-sixth of his interchange business is with Nelson, and I take it that means traffic that leaves your line and traffic that comes on to your line by interchange?

The Witness: Yes. Now understand that that figure is approximate.

Exam. Baumgartner: An approximation.

The Witness: Yes, it is.

By Mr. Mueller:

Q. Now do you understand, or do I understand correctly, father, that you have a 60-40 divisional arrangement with three other carriers in addition to Nelson?

A. Yes.

Q. Can you tell us with whom?

A. Yes, I can if you want it.

Q. Will you do so?

A. Yes. It's with Hyman's in New York, Hyman's Express, and with Byrnes Long Island Motor Cargo, Incorporated.

Mr. Barrett: How do you spell that Byrnes?

The Witness: B-y-r-n-e-s, Byrnes Long Island Motor Cargo, Incorporated. I can't think of the other one, the name of the other one. It's another Long Island carrier anyway. It goes from New York City out to Long Island, covers the whole Island.

Exam. Baumgartner: Now who gets the heavy end of this [fol. 742] division, your company or the other carrier?

The Witness: Well, I get the heavier end.

Exam. Baumgartner: In all three cases?

The Witness: I get the heavier end on all three cases and in one instance it's a 50-50 split down through the middle.

Exam. Baumgartner: Constant?

The Witness: Constant 50-50, yes, it is.

Exam. Baumgartner: With respect to all shipments interchanged?

The Witness: Yes.

By Mr. Mueller:

Q. Now with reference to Hyman's Express, do they serve more than one point?

A. They serve the whole Island which is about 100 miles long, all of Long Island, any point in Long Island.

Q. They have that authority?

A. Well, they service it for me.

Q. Do they service it for you?

A. Yes, indeed.

Q. Regardless from what point?

A. Regardless from what point on the Island that split prevails.

Q. Is the same true as to Byrnes?

A. Byrnes Long Island Motor Cargo?

Q. Does it serve more than one point for you?

A. It serves the whole Island, all 100, 110 miles of the [fol. 743] Island with the same split-up. There's no change in the split-up. If they just have to haul it 10 miles or 110, the same split prevails.

Q. In answer to a question by Miss Kelley as to what caused you to negotiate this transaction, referring to the application now before us, I understood you to say, "Solomon spoke to me about the possibility of merging." Do you mean by that did he propose the merger to you or did you propose the idea to him?

A. Well, let's put it this way: He sowed the seed, and of course I'm in constant touch with him on accounting matters, let's call it, accounting matters, and that's when he mentioned it.

Q. Your statement is that he gave you the idea?

A. Yes.

[fol. 750] KENNETH A. H. NELSON, resumed.

Cross examination (continued).

By Mr. Barrett:

Q. Mr. Nelson, you stated that at the present time you control 100 percent of the stock of Gilbertville Trucking Co. despite the testimony that a Mr. Kashady and Mr. Nelson also were stockholders, is that correct?

A. That is right.

Q. And, of course, your attorney having one share for qualifying purposes.

A. That is right.

Q. Now when this contract or agreement was signed that is the subject of this hearing, did you also control 100 percent of the stock at that time?

A. At the time that the contract was signed for this merger?

Q. Yes.

A. Yes.

Q. And did you also control 100 shares when the application was signed, the application for transfer of merger?

A. Yes.

Q. And I presume, then, that you also owned 100 percent when the application was filed with the Commission.

A. Yes.

Q. Now your company also holds intrastate authority, does it not?

[fol. 751] A. Yes.

Q. From what states?

A. Massachusetts.

Q. And can you tell us, percentagewise, how much of the total revenue consists of traffic moving in intrastate commerce?

A. No, I am afraid I couldn't give you percentage.

Q. Could you give us any estimate as to the amount that is intrastate vs. interstate?

A. No, I am afraid I couldn't. I haven't really made a survey of the intrastate traffic.

Q. Could you tell us which is more or less?

A. Intrastate vs. interstate?

Q. That is correct.

A. The interstate would be more.

Q. Does the company transport less than truckload traffic?

A. Yes.

Q. And in the handling of that traffic, normally, it is picked up by a truck, goes into a terminal, consolidated into a line-haul vehicle and brought to another terminal where it is sorted again for delivery, is that correct?

A. That is right.

Q. Now can you tell us at which one of your terminals the principal sorting of this less than truckload traffic is done?

A. Well, that would be very hard to say because it is about an even amount in all terminals. There might be a [fol. 752] little more in New York.

Q. Well, maybe if I put the question this way to you, assuming you had calls in New York City, say for the pickup of many less than truckload shipments who are destined for Massachusetts, will you explain to us how those shipments are picked up and how they are physically handled up to delivery.

A. Yes. They are brought into the New York platform and, in some cases, they are actually loaded on the vehicle at pickup and left right on the vehicle, depending to what part of Massachusetts they are going. For example, if they were going to western Massachusetts or central Massachusetts, they would go to Gilbertville. If they were moving toward northeastern Massachusetts or that area, they would move from New York through the Gilbertville gateway and Hardwick gateway on into Boston and there they would be distributed.

Exam. Baumgartner: You said in many cases that shipments picked up at New York are left right on the vehicle.

The Witness: That is right.

Exam. Baumgartner: What do you mean by that?

The Witness: Well—

Exam. Baumgartner: Picked up by the line-haul vehicle?

The Witness: That is right.

Exam. Baumgartner: And the other shipments are picked up by pickup and delivery vehicles.

The Witness: That is right, yes.

[fol. 753] Exam. Baumgartner: And they are loaded then to the line-haul vehicle with the shipments that are already in there.

The Witness: That is correct.

Exam. Baumgartner: That were picked up by the line-haul.

The Witness: That is correct.

By Mr. Barrett:

Q. In any cases are vehicles leaving New York dispatched to your Ellington terminal?

A. Yes, some are.

Q. And what kind of traffic is on those? Is it truckload or less than truckload?

A. Generally speaking, it would be truckload.

Q. First, in the case of truckload traffic, how is that operation handled, and I am referring to vehicles that go to Ellington, Connecticut.

A. Yes, but explain where the shipment would be headed for.

Q. Well, we will first take a point in Massachusetts.

A. The line-haul vehicle would move from New York to Ellington and terminate there and then move on from there onto the destination via the proper gateway.

Q. And is that a truckload shipment?

A. That would be on a truckload shipment.

Q. Now less than truckload.

Exam. Baumgartner: For clarification, what did you mean that the movement would terminate at Ellington?

The Witness: Actually, it wouldn't terminate there; it [fol. 754] would, let's call it, pause there.

Exam. Baumgartner: I want to keep the record as clear as I can.

By Mr. Barrett:

Q. Now, assuming that that same shipment we are talking about was a less than truckload shipment, how would it be handled from New York City to a point in Massachusetts?

A. It would move and pause at Ellington, where it would be broken down to the direction that it was going and then move on through the proper gateways to the destination.

Q. Now assuming that less than truckload shipment we are referring to was destined, first, to a point in western Massachusetts, we will take Pittsfield, for example, how would it move beyond Ellington?

A. Into Pittsfield?

Q. Yes.

A. If it were originating at New York?

Q. Right.

A. The shipment in question?

Q. Yes.

A. It would move on up to Hardwick and then on to Pittsfield.

Q. And if it were destined to eastern Massachusetts, for example to Boston, how would it go?

A. No eastern Massachusetts would come in on Rockville, as a general rule; they would go direct through.

[fol. 755] Q. Now I am going to ask you the same question relative to a truckload shipment that originates at New York that is dispatched to your Ellington terminal and destined to a point in Connecticut, take any point in Connecticut, New Haven for example.

A. Well, I don't remember too much truckload traffic, to be perfectly frank, into Connecticut points. As a matter of fact, it would be very very unusual for truckload traffic into points of Connecticut, but, if it were moving via Ellington, that is, pausing at Ellington, it would then move on into Gilbertville and into the point in Connecticut.

Q. Will you explain the physical operations of the truckload shipment after it leaves Ellington. I presume a line-haul vehicle takes it from New York City to Ellington.

A. That is right.

Q. What happens beyond Ellington?

A. Beyond Ellington it would move on into Gilbertville.

Q. And from there, where would it go?

A. Then on to the destination point.

Q. And how would it move to the destination point?

A. On the line-haul vehicle, unless it were LTL.

Q. Assuming the vehicle is in Gilbertville now and the shipment is destined to New Haven, Connecticut, where would the vehicle go from Gilbertville?

A. The vehicle would go to New Haven.

[fol. 756] Q. By what route or routes, principally?

A. Well, since we are an irregular route carrier, any route that he felt like taking would be all right with me.

Q. Now the same example, a shipment moving from New York City via your Ellington terminal that is a less than truckload shipment destined for New Haven, Connecticut, for example.

A. An LTL shipment you are referring to now?

Q. Yes. Do you understand your last explanation was for a truckload shipment?

A. Yes. That would be on the lighter side. Usually such shipments are handled via Gilbertville direct, that is, into Gilbertville direct, where they are combined with shipments that originate in Massachusetts destined for Connecticut points, and then they flow on down through into the Connecticut points.

Q. In any instance, is traffic destined to a point in Connecticut dispatched from New York City to your Ellington terminal?

A. LTL traffic, yes, and then from there it would go to Gilbertville, where it would be combined with other Connecticut freight, LTL freight, for delivery.

Q. And would that delivery from Gilbertville be effected on this LTL shipment in the same manner as you have stated for the truckload shipment, generally?

A. From Gilbertville?

[fol. 757] Q. Yes.

A. Yes, it would be distributed.

Q. Now on the average, how many vehicles are you loading per day moving between Massachusetts and New York?

A. Between Massachusetts points and New York?

Q. Right. Give us each way and the total.

A. That would be kind of difficult for me to say.

Q. Can you give us a minimum number you move between those points?

A. We are speaking now of Massachusetts points; oh, perhaps three vehicles.

Q. And is that each way?

A. Well, they would have to move each way, yes.

Q. That is per day.

A. Yes.

Q. And that is a minimum?

A. This is rough.

Q. It is an estimate, I understand that.

Exam. Baumgartner: Did you say three vehicles each way?

The Witness: Yes.

Exam. Baumgartner: And a total of six.

The Witness: Well, three vehicles southbound and they would have to come back.

Exam. Baumgartner: The same day?

The Witness: The following day.

[fol. 758] By Mr. Barrett:

Q. Normally, these trucks you have listed being owned by your company are used for pickup and delivery work.

A. No, they are used for every phase of the operation. The trucks I have listed on the exhibit, you mean?

Q. That is correct.

A. No, they are used for every phase of the operation.

Q. Are any of them devoted to pickup and delivery work at any terminals?

A. Yes, the ones that I mentioned were in New York would be for pickup and delivery work.

Q. That is five, correct?

A. Yes.

Q. At Rockville, you have listed four; what are they used for?

A. They would be used for picking up and actually for line-haul and delivery as well.

Q. Now if I asked you the same question relative to the one pickup truck at Gilbertville, the three at Woonsocket, and two at Newton, what would your answer be?

A. They would be used on line-haul and delivery. For example, the shipment or shipments might be picked up at Fitchburg and on the very same vehicle move down into Connecticut points for delivery on the same vehicle.

Q. Now do you use the straight truck for line-haul operations to and from New York City?

A. The straight truck?

Q. Yes, as a general practice.

A. As a general practice, no. We have used them, but as a general practice, no.

Q. When you use one it is the exception to the rule rather than the rule.

A. Yes.

Q. Now getting back to my question as to the number of vehicles or trips running per day between Massachusetts and New York points, assume you had those three trips moving out of Massachusetts tonight; will you correspondingly have some vehicles moving out of New York City tonight destined for Massachusetts with freight?

A. Yes.

Q. And those vehicles that came into Massachusetts with freight from New York, arriving early tomorrow morning, would be loaded, if you had freight, back to New York tomorrow night, is that correct, not the identical vehicles, but other vehicles would be loaded back.

A. I don't know as I get you exactly.

Q. I will withdraw the question. You stated that tonight you might have three vehicles loaded into New York City.

A. Yes.

Q. And correspondingly, tonight, out of New York City, [fol. 760] you would have vehicles loaded coming into Massachusetts.

A. That is what we try to do.

Q. That is the normal practice if the freight is available.

A. Yes.

Q. And I asked you what would be the average number going between Massachusetts and New York City and you said three.

A. Approximately.

Q. And that is a minimum?

A. Well, that would be a minimum.

Q. And then the Examiner asked you whether that was one way or two ways and you said the next day those vehicles would come back to Massachusetts, do you recall that?

A. That is right.

Q. But on the day they are moving to New York City, you have other vehicles that are moving back from New York City, isn't that correct?

A. Yes.

Q. With that in mind, does that three that you have given us include both the northbound and southbound movements or just one part of it? In other words, the three trips per day, do they involve trucks moving in both directions or is it three trips southbound and a different number northbound or what?

A. No, if they moved southbound full, they would have to move northbound either empty or full. I don't know as I understand exactly what you are driving at, but if they [fol. 761] moved to New York full, they have either got to move back empty or loaded.

Exam. Baumgartner: Let's get this clear.

By Mr. Barrett:

Q. I am going to press a little further because I am not satisfied. On the average day, what is the average minimum number of vehicles the company dispatches from its Massachusetts terminals to its New York terminal?

A. What is the minimum number?

Q. Average number, I am asking you.

A. I said approximately three.

Q. On that same day, what is the average number of vehicles your company is dispatching from the New York City terminal to Massachusetts?

A. Massachusetts points?

Q. Yes.

A. That would be three, same number.

Mr. Barrett: Does that satisfy you, Mr. Examiner?

Exam. Baumgartner: I think that clears it up, yes, thank you.

By Mr. Barrett:

Q. Now do you also use tractors and trailers in your intra New England operations; that is, between points in Massachusetts, Rhode Island and Connecticut you serve?

A. Well, we use both types. There is no differential between the two.

[fol. 762] Q. I know you have already explained you use tractors; now I am asking do you also use tractors and trailers in operations between points in Massachusetts, Rhode Island and Connecticut?

A. Yes, sir, we do.

Q. And the average day, forgetting your trucks, how many tractors are you using in that New England area?

A. Well, it would be very difficult for me to estimate. Are you referring to all phases?

Q. That is right.

A. Are you speaking of leased and owned equipment?

Q. Yes.

A. We would be using all of our own equipment and leasing anywhere from one to possibly half a dozen vehicles, somewhere around there.

Q. Is that per day?

A. Yes.

Exam. Baumgartner: When you use the term "vehicles," are you referring to tractor and trailer as constituting one vehicle?

The Witness: That is right, yes.

By Mr. Barrett:

Q. Now in your operations, do you normally use all the equipment that your company owned that you have testified to here with the exception of vehicles that may be laid up for maintenance and repairs?

A. That is right.

[fol. 763] Q. Now who do you lease these one to six vehicles per day that you have just mentioned from?

A. As a general rule, from L. Nelson & Sons.

Q. And these 53 truck drivers you have mentioned, are they normally used by your company each operating day?

A. What was that?

Q. I will repeat the same question. In your normal operations, do you use these 53 drivers every day?

A. Yes, those would be steady drivers.

Q. Do you have any vehicles on permanent lease?

A. Yes, we have some.

Q. Before we go any further here, do you understand what I mean by permanent lease? I mean one that is for a stated period of time, thirty days or more, and not a trip lease.

A. Yes.

Q. Now, do you have any vehicles on a permanent lease?

A. Yes, we do.

Q. Approximately how many?

A. That would be difficult for me to say; I would have to check that.

Exam. Baumgartner: Do you mean, Mr. Barrett, from L. Nelson & Sons?

Mr. Barrett: No. I just asked him the general question.

Exam. Baumgartner: Regardless of the lesser.

Mr. Barrett: That is correct.

[fol. 764] By Mr. Barrett:

Q. Is it more than one?

A. Yes, it would be.

Q. Is it more than 10?

A. Oh, no.

Q. Is it more than five, do you know?

A. Well, I can't say exactly, but I know it is less than five.

Q. Well, we can split it in the middle, is it more or less than three?

Miss Kelley: Could I suggest the witness take time to figure it out?

Exam. Baumgartner: Can you answer the question, Mr. Witness?

By Mr. Barrett:

Q. I am just asking you for an estimate.

A. You are asking for an estimate and you are trying to buttonhole it to some specific number. I would say the estimate would be five or less.

Q. And that is an average figure.

A. I would suggest so.

Q. And from whom are those vehicles leased?

A. They would be leased from L. Nelson & Sons.

Q. And for how long a period of time have those leases been in effect?

A. They would be varying lengths of time.

Q. Have any of them been in effect for six months or [fol. 765] more, to your knowledge?

A. Yes, that is possible.

Q. Now I would like to ask you what vehicles are covered by these long-term leases we have been referring to, or what type of vehicles.

A. As a general rule, it is old—

Q. I mean the type, trucks, tractors, trailers or what?

A. It would be tractors and I think straight jobs as well.

Q. Just to clarify the record, when you refer to a tractor, do you also include a trailer to go with that tractor?

A. Not necessarily, no.

Exam. Baumgartner: Do you lease any trailers for the permanent period in the sense in which Mr. Barrett is using that term?

The Witness: No, trailers are on trip lease.

Exam. Baumgartner: All on trip lease?

The Witness: Yes.

By Mr. Barrett:

Q. So then all of these permanent leases cover either tractors or trucks.

A. That is right.

Q. Now out of the average five you have given us, how many of those are trucks as opposed to tractors?

A. Well, possibly half and half.

Q. Do you know?

A. I don't have the exact figures before me, Mr. Barrett.

[fol. 766] Q. I appreciate that, but you are in charge of your company's operations each day, are you not?

A. That is right.

Q. And responsible for making equipment available to meet the needs of the company.

A. That is correct.

Q. And in doing that, you must know how many vehicles your company owns.

A. Yes.

Q. And you must know how many it has available on a daily basis to handle the traffic that it normally handles.

A. Well, we make the necessary equipment available using our own and whatever we need to lease and Nelson has available to lease.

Q. Now I am not asking you about trip leases. Under these permanent leases, you must consider that equipment available.

A. Yes.

Q. Without making arrangements day to day.

A. That is true.

Q. And I am merely asking you, you knowing how your company operates in your mind, how many trucks, in addition to those you own, are available on a day to day basis without having a trip lease from Nelson.

A. I would suggest three straight trucks.

Q. And I will ask you to approximate the number of tractors.

[fol. 767] A. That would be probably two or three.

Ex n. Baumgartner: Mr. Witness, when you use the word "suggest," what do you mean by that, you estimate?

The Witness: Yes, estimate.

Exam. Baumgartner: I would rather you would use one of those terms than the word "suggest."

The Witness: I will use that term.

By Mr. Barrett:

Q. Now, those vehicles you just talked about are under permanent lease that we defined.

A. Yes.

Q. Now in addition to those that we have described under permanent lease, could you estimate an average number that are trip leased from Nelson each day?

A. I thought you have already asked me about the trip lease. You asked me to estimate the trip lease number.

Q. And is this the answer, one to six vehicles?

A. Yes. Did I say six?

Q. One to six.

A. Approximately.

Q. And those one to six are trip leases in addition to the approximately five permanent leases.

A. Yes.

Q. Now you have been in the trucking business some time, have you not?

A. Yes.

[fol. 768] Q. And prior to being with Gilbertville, you were with Nelson, is that correct?

A. Yes.

Q. And as far as you know, in the normal truck operation, is it usual to have more trailers than tractors?

A. As a general rule, that is correct.

Q. Now I note from your equipment list you have twelve tractors as against eight trailers.

A. Yes.

Exam. Baumgartner: Which equipment list are you looking at, Exhibit 25?

Mr. Barrett: That is Gilbertville's.

Exam. Baumgartner: Exhibit 25.

By Mr. Barrett:

Q. Now in giving us this trip lease of one to six vehicles, did that include trucks and tractors only?

A. Trucks and tractors only?

Q. Yes.

A. No, I didn't say that.

Q. All right, I am just asking the question.

A. Units; in other words, tractors and trailers.

Q. Now in addition to those one to six units you have referred to as your trip lease, do you lease trailers alone?

A. Trailers alone?

Q. Yes.

A. Yes, we do that occasionally.

[fol. 769] Q. Are they included in any of the figures you have given us?

A. No.

Q. And from whom do you lease those trailers?

A. As a general rule it would be from Nelson's.

Q. Can you tell us on an average how many such trailers are leased by your company from Nelson on any day, forgetting any reference to any other figures you have given us?

A. Yes. You are speaking now on a daily basis, right?

Q. Yes, I am asking you to estimate.

A. An average day. Well, we lease the tractor and the trailer units and I told you that there would be from one to six of complete units and probably a couple trailers. I would estimate two trailers per day.

Q. And all those vehicles you have testified that your company has been leasing, those have all been leased predominantly from L Nelson.

A. Predominantly, yes.

Q. Can you recall from any other source you have leased such equipment?

A. Yes, we have leased from other sources. There is one I can think of in particular, an oil company up in Ware, and in New York, we have an arrangement with a company, Smith and Jordan, where we lease the equipment to them and they lease the equipment to us and it is on an arrangement where it works itself out.

[fol. 770] Q. Does this Smith and Jordan do any pickup and delivery work for your company in New York City?

A. Yes.

Q. Do you know whether it does any for L Nelson & Sons?

A. I couldn't tell you.

[fol. 771]

By Mr. Barrett:

Q. Now your tractors, you stated, are being used, 12 in number, every day, is that correct?

A. Twelve in number every day?

Q. Yes, your own company-owned ones.

A. Yes, except, of course, when there is one knocked out by virtue of mechanical failure.

Q. So as far as your company-owned operations are concerned, on the average day you must make up four trailers to go with those 12 tractors.

A. That is right, if they are all operating.

Q. And they are, I think you testified, normally used from L. Nelson.

Q. Now as far as your interchange with L. Nelson is concerned, that is conducted only on a limited class of commodities, is that correct?

A. That is right, whatever Nelson is authorized to handle.

Q. And as we previously said, that is generally in the textile line.

A. That is right.

Q. Now when interchanging with the Byrne Company, [fol. 772] that is accomplished in New York City, is that not correct?

A. That is right, yes, sir.

(Discussion off the record.)

By Mr. Barrett:

Q. These 25 other carriers you interchange with in New York City, do they generally serve points that are not covered by the Byrne's service?

A. The points that are covered, first of all, by the Byrne's service, meaning New Jersey, Pennsylvania, Maryland, Delaware, Washington, Virginia, West Virginia, the whole eastern seaboard.

Q. They cover that area.

A. That is right.

Q. Now for the most part, the traffic that you interchange with to these carriers, that is moved to points that are beyond the Byrne's service; for example, going through

some of these bills and the list of shipments, Bloomsburg, Pennsylvania.

A. What was that question again, Mr. Barrett?

Q. I will rephrase it. The general practice is to interchange with Byrnes traffic that moves to points in New Jersey and the Philadelphia that Byrnes serves.

A. If the shipment is not specifically routed. As a general rule, if Byrnes serves the point in question, we will prefer the Byrnes line. We will give preference to the Byrnes line.

Q. And these other carriers are used for other shipments [fol. 773] where the shipment might be routed or it is moving to or from a point that Byrnes does not serve.

A. That is correct.

Q. Now where is the physical interchange with Byrnes effected?

A. New York, N. Y.

(Discussion off the record.)

By Mr. Barrett:

Q. Could you tell us where the predominant amount of interchange between your company, Gilbertville Trucking, and L Nelson occurs?

A. Can I tell you where?

Q. Yes.

A. The bulk of it would be at Monson, Massachusetts.

Q. And in my reviewing Exhibit B-7 and the freight bills supporting it, would I be correct in inferring that the bulk of it occurred at Monson, Massachusetts?

A. Yes, sir, the bulk of it would.

Q. Now would you take your Exhibit No. 26.

A. Yes, sir, I have it.

Q. And you are familiar with the shipments that are shown therein.

A. Yes; indeed.

Q. Could you indicate on that exhibit where there has been any interchange with L Nelson & Sons at any other point other than Monson, Massachusetts?

[fol. 774]. A. Yes, on page 3, on page 6.

Q. On page 3, will you indicate that shipment for me?

A. What was the question, Mr. Barrett, I have the shipment in question?

Q. At any other point interchange with L Nelson than at Monson?

A. Yes, this on page 3. There is a shipment moving between—

Q. Give us the pro number.

A. 67875, a shipment moving to Pittsfield, Massachusetts from a point in Pennsylvania.

Q. And where was that interchanged?

A. That would have been interchanged at Ellington, Connecticut or Somers, Connecticut, but the physical interchange would take place, actually, in Ellington, Connecticut.

Exam. Baumgartner: Just a minute. For clarification, you are referring to pro No. 67875.

The Witness: That is right.

Exam. Baumgartner: You stated that the destination was Pittsfield.

The Witness: That is right, Pittsfield, Massachusetts.

Exam. Baumgartner: It is indicated on this sheet as being the origin point.

The Witness: I beg your pardon; I am sorry; it was just an error on my part.

(Discussion off the record.)

[fol. 775] The Witness: I want to correct that to Pittsfield as the origin point.

Exam. Baumgartner: Is that still an illustration to Mr. Barrett's question?

The Witness: Yes, it is.

Exam. Baumgartner: It is all right for that.

The Witness: Yes, sir.

By Mr. Barrett:

Q. Now I am showing you this particular delivery receipt, 67875. Since that is the first one we have examined, will you indicate for the record what your delivery receipt shows as far as general information is concerned.

A. It shows that the shipper is located at Pittsfield, Massachusetts, that the shipment is destined to Clifton Heights, Pennsylvania and it is transferred to Nelson at Souers, Connecticut.

Q. And also does it show the number of pieces, the commodity, the weight, the rate?

A. It does, and it also shows the division of revenue.

Q. And it shows on the bottom a stamp, "Received by L. Nelson & Sons Transportation Co."

A. That is correct.

Q. And on the heading it shows Gilbertville Trucking Co., Inc.

A. Yes, it does.

Q. And it shows a P. O. Box address, No. 58, at Gilbert-[fol. 776] ville, Massachusetts.

A. Yes, it does.

Q. And it shows terminals at Boston, Lowell-Lawrence, Worcester, New York, N. Y., Philadelphia, Woonsocket and Rockville, giving telephone numbers after each, is that correct?

A. Those numbers—

Q. Will you answer the question.

Miss Kelley: I think he is answering the question. He should have an opportunity to answer.

The Witness: This does not represent terminals.

By Mr. Barrett:

Q. What I just explained to you is on the delivery receipt, is that correct?

A. The telephone numbers, yes.

Q. And they are after certain locations, for example, Boston, Lawrence, Lowell, as I have previously enumerated, is that correct?

A. They are not offices, however, telephone listing only.

Q. Now my next question would be to ask you to explain, for example, a telephone number on a Gilbertville Trucking receipt at Philadelphia, Pennsylvania.

A. Gilbertville Trucking Co. has the authority to service Philadelphia, Pennsylvania on special commodities.

Q. You also show Wilmington, Delaware, will you explain that.

A. Because we service Wilmington, Delaware on special [fol. 777] commodities.

Q. Now in connection with those two places, Philadelphia and Wilmington, does your company have personnel stationed there to accept calls?

A. No, they do not.

Q. Who accepts the calls for them?

A. We do not have any telephone at Wilmington Delaware. At Philadelphia, we have never received a call that I know of.

Q. Is L Nelson listed in Philadelphia at that same Garfield number?

A. Yes, L Nelson is listed under the telephone number shown there, is that correct.

Q. So if you did get a call at Philadelphia, it would come in L Nelson's terminal.

A. Yes.

Q. While we are on the subject of telephones, in Boston, the Decatur number, is that the same telephone number that is listed to L Nelson?

A. That is correct, it is.

Q. In Lawrence and Lowell, you have an Enterprise number, is that the same listed to L Nelson?

A. Yes, that is correct.

Q. And, do you know whether or not L Nelson has a terminal at Worcester?

A. They do not have a terminal at Worcester.

[fol. 778] Q. Do you know, in connection with that Worcester number—it is a Pleasant exchange—whether that is listed in their name also?

A. The Worcester exchange is also listed in their name.

Q. If I asked you the same question with relation to Ravinswood exchange at New York, N. Y.

A. Yes, that is a Nelson telephone.

Q. If I asked you the same question about the telephone numbers shown at Philadelphia, Woonsocket and Rockville, Connecticut, would your answer be the same?

A. Rockville would not be the same, no, sir, that is my own telephone.

Q. Philadelphia and Woonsocket would be.

A. Philadelphia and Woonsocket would be, yes, sir.

Q. In other words, it is the same number listed to Nelson and to your company.

A. That is right.

Q. And that is the general form used by your company, is it not?

A. That is right, yes.

Exam. Baumgartner: What kind of a form is that?

The Witness: Pro form of bill.

Exam. Baumgartner: Is that what is issued to the consignor?

The Witness: Consignee.

Mr. Barrett: I don't believe the witness made a correct [Tol. 779] statement there.

Exam. Baumgartner: You mean you issue a bill of lading to the consignor, don't you?

The Witness: We issue a bill of lading to the consignor and a pro form of bill of lading to the consignee.

Exam. Baumgartner: Now I understand.

The Witness: Pro former, that is where they get the word "pro" from. I don't think there are nine people out of ten that know what pro means.

Exam. Baumgartner: Frankly, I didn't know the origin of the word pro.

The Witness: That is what it is, is a pro former copy.

Exam. Baumgartner: I thought it was taken from the Latin meaning to go forward, progress. Is that a duplicate of the bill of lading that is issued to the consignor?

The Witness: That is right. It is supposed to be copied verbatim.

Exam. Baumgartner: Is it a duplicate?

The Witness: It is not a duplicate, no. It is a copy. You copy it from the bill of lading onto the pro former bill of lading.

Exam. Baumgartner: A separately-made copy.

The Witness: Yes.

By Mr. Barrett:

Q. In other words, these are sometimes called waybills.

[fol. 780] A. Some people call them waybills; we prefer to call them pros.

Q. What you have shown me and what you have in front of you is the delivery receipt which is the copy that your company retains after getting the consignee's signature.

A. That is right, yes, a permanent delivery receipt.

Q. Now on that particular one you have before you, which is that shipment from Pittsfield, Massachusetts to Clifton Heights, Pennsylvania, it shows an interchange with L. Nelson at Somers, Connecticut.

A. That is right.

Q. Now will you tell us how that operation is conducted.

A. The truck, depending upon what it had for lading, might—

Q. May I interrupt you a moment, this is a 23,000 odd pound shipment.

A. This is a 2300 pound shipment.

Q. I am sorry; just describe that shipment.

A. I couldn't tell you exactly how this particular shipment moved, but if it did not have anything else on the vehicle but this shipment, it would have come down and, again, if he was not called into the Gilbertville terminal or have to call at the Monson interchange point to pick up lading on that parked trailer, he would go from Pittsfield through Springfield and down to Somers and just beyond Somers to the Town of Ellington, where the Nelson Company is located, which, by the way, is within a short distance [fol. 781] from the Somers Post Office.

Q. Now as far as Somers is concerned, is that interchange actually effected at the Town of Somers or at Ellington?

A. It would be over the line in Ellington. The physical interchange would take place at Ellington, Connecticut.

Q. And why do you show Somers on the delivery receipt?

A. Because it is being transferred within the commercial zone of Somers.

Q. And are you familiar with Somers; is it a town?

A. Yes, it is a town.

Q. So if I ask you additional questions as to where the symbol S appears on Exhibit 2 under the column "Interchange Point," when S refers to Somers, Connecticut, the interchange was actually effected at Ellington, is that correct?

A. That is correct, for convenience sake.

(Discussion off the record.)

By Mr. Barrett:

Q. Now Exhibit 26 shows comparatively few of those interchanges at Somers, is that correct?

A. Exhibit 26?

Q. Yes.

A. That is not the only one that shows on page 3, page 6.

Q. I am not asking you to count them—that is just a mechanical process—but they show comparatively few as to Monson.

A. That is true.

[fol. 782] Q. And did you hear the testimony of Mr. Chilberg as to how the traffic was interchanged at Monson between the two companies?

A. Yes.

Q. If I were to ask the same questions, would your testimony be substantially the same?

A. As I recall his testimony, it would be substantially the same.

Q. Now in any instances where your company interchanged with Nelson at Monson, is there any occasion where a tractor-trailer of one company will come into Monson and the same tractor and trailer, without any exchange of either the tractor or the trailer, will continue onto destination under lease to the other carrier?

A. No, sir.

Q. There is always a change of drivers or equipment at Monson.

A. It is not a change of drivers, it is an exchange of equipment. The box would either be dropped or the LTL shipment shifted onto the other vehicle and that driver go on to some other point.

Q. If I ask you the same question relative to any interchange at Ellington or Somers, would the answer be the same?

A. Well, now—

Q. Do you want me to restate the question?

[fol. 783] A. Yes, I think you better.

Q. Is there any instance, on an interchange between Gilbertville and L. Nelson at Ellington, where the tractor-trailer unit or the truck, whichever the case might be, moves beyond the interchange point over the lines of the other carrier?

A. No. I will explain to you. When we are offered shipments in transfer or shipments to be transferred to our lines by Nelson at Ellington or at Monson or wherever the point may be, there is no unit that goes through; in other words, as it is turned over to us. If we are told first of all what shipments they have available to us and if we have sufficient equipment of our own, we handle it with our own equipment. If we do not, then we ask them for the lease of the equipment and no unit is specifically leased because there is a load on it, let's say.

Q. Now that brings up my next question. Assuming you had a load coming into one of these interchange points you just referred to and Gilbertville did not have equipment to handle it and it found it necessary to lease a piece of equipment from Nelson, and Nelson did have equipment available and did lease a piece of equipment to Gilbertville, in any instances is that piece of equipment that is leased the same vehicle on which the load originally moved when it was on Nelson's line? Now that is a long question.

A. I know what you mean. Of course we can't dictate to [fol. 784] Nelson what equipment they are going to lease to us, but I suppose, over a period of time, such a situation might be unavoidable, but, actually, we request equipment from them and whatever equipment they have convenient to lease us, that is what we get and we just take care of whatever freight we have on hand, whether it is with their leased equipment or our own.

Q. Now in the course of that answer you suppose something and you have made a statement of certain things were unavoidable. I asked you a definite question; to your knowl-

edge, has that situation ever occurred where Gilbertville has leased the same piece of equipment from Nelson that contained the original movement when it was on Nelson's line.

A. Well, I can't testify that I actually know that that has been the case. I don't recall specific instances.

Q. Then you want your testimony to read it is possible it could have happened.

A. It is possible that it could have happened, yes.

Exam. Baumgartner: May I interject a question. When a truckload shipment moves into Ellington over the Nelson lines, and that truckload is on a trailer, before the shipment comes onto your line, is that load transferred to another trailer?

The Witness: No, not necessarily.

Exam. Baumgartner: Then the trailer does move through.

The Witness: Well—

Exam. Baumgartner: Your testimony up to now has [fol. 785] dealt with units of equipment.

The Witness: Yes.

Exam. Baumgartner: What I am trying to get at is what you mean by unit of equipment.

The Witness: The unit of equipment, Mr. Examiner, I referred to is a tractor and trailer.

Exam. Baumgartner: With the motive power?

The Witness: With the motive power, right.

Exam. Baumgartner: I wanted to get that cleared up because at some points in this hearing trailers were referred to as a unit and on the other hand, tractors were also referred to as a unit, but what you are talking about in response to Mr. Barrett now, when you referred to a unit, you mean a unit having motive power.

The Witness: That is right. I might explain myself there.

By Mr. Barrett:

Q. Let me ask you this question for clarification. It was my intent, when I was asking those questions, to accept the ordinary interchange of a trailer from one line to another. Did you so understand?

A. That is what I thought you were referring to. I think what Mr. Barrett wanted to know was if the entire piece as a unit went forward leased, including the tractor and the trailer.

Q. That is correct. Now did you hear some testimony as [fol. 786] to the fact that Gilbertville pays \$400 per month as its share on the Nelson's telephone bill?

A. That is right, we pay \$400 a month.

Q. Will you tell us what that \$400 a month covers?

A. Yes. That \$400 a month covers our use, when the lines are clear, of the long-lines arrangement that the Nelson Co. had between terminals. It also covers the telephone listings that we have at their various terminals.

Q. And that is just a flat charge between the two companies per month, irrespective of the use of the individual lines.

A. That is a stable figure.

Q. Now in addition to that \$400 per month, I presume that is paid direct to Nelson and not to the Telephone Company.

A. That is right.

Q. Does Gilbertville pay any other telephone bills?

A. Yes.

Q. What do they cover?

A. At our main terminal at Gilbertville and at Ellington, Connecticut.

Q. I am going to show you another one of your delivery receipts, No. 15,210, which shows a shipment of machine parts from Spencer, Massachusetts to Philadelphia, Pennsylvania on 3/18/55, and the weight of 600 pounds. Does that state the essential information on that?

A. Yes, it does.

[fol. 787] Q. And it shows an interchange with Byrnes at New York.

A. At New York, right.

Q. And on the bottom, where it says "Received in good condition," there is a stamp on there, "R. A. Byrnes, Inc., Rockville, Connecticut," is that correct?

A. Yes.

Q. Do you know where that stamp is put on?

A. I couldn't tell you. I would assume at New York.

Q. But you don't know.

A. No. As long as the Byrnes' stamp is on there, we don't care what it says as long as they have got their stamp on there. We turn it over to them at New York, N. Y.

[fol. 788] By Mr. Barrett:

Q. Now there are three other delivery receipts that I want to ask you a question or two on, one dated 3/18/55 and the number is 15212. That shows a movement from Pawtucket, Rhode Island to Rockville, Connecticut, with a transfer from Nelson Transportation at Marlboro, Massachusetts, is that correct?

A. Yes.

Q. Can you explain, first of all, the transfer at Marlboro, Massachusetts?

A. Yes, it would have been turned over to a truck en route.

Q. Now your Exhibit B-7 on that date shows that shipment, Pro 15212 but it does not show the interchange point at Marlboro, is that correct?

[fol. 789] (Discussion off the record.)

Miss Kelley: Is it clear on the record that was inadvertence the interchange point didn't show?

By Mr. Barrett:

Q. Was that a mistake that Marlboro was not shown as an interchange point on that shipment?

A. On the exhibit?

Q. Yes.

A. Yes, that is right.

Q. Do you know how many such mistakes were made in preparing the exhibit?

A. None. It is perfect.

Exam. Baumgartner: With that exception.

The Witness: With that one exception.

Miss Kelley: Mr. Examiner, I am afraid I have to disagree with the witness. It was prepared in my office with

them rechecking it and I hope that we are correct and that there are no errors, but I can't swear to it. We tried very hard to avoid any errors.

By Mr. Barrett:

Q. And when I asked you about this shipment with the Marlboro interchange, did I give the origin and destination of the shipment?

A. That is right.

Q. And the commodity is orlon yarn.

A. Yes, sir.

Q. Now I show you another pro, 16051, with the date of [fol. 790] 5/18/55. The shipment is apparently a truckload lot of grease wool.

A. No, it is not a truckload. It would be about a half a truck, a little less, let's say a half a truck.

Q. And the origin is Norwood, Massachusetts and the destination is Providence, Rhode Island, correct?

A. Yes.

Q. Will you tell us how that operation would be handled.

A. That shipment would have moved from Norwood overnight to Providence via either Gilbertville or Ellington, Rockville. It would have been delivered overnight.

Q. By Gilbertville?

A. By either Gilbertville or Ellington, Connecticut, Rockville, either way.

Q. In other words, it went through one of those two terminals.

A. That is right.

[fol. 791]. By Mr. Barrett:

Q. I will restate my question, Mr. Examiner. Norwood is a point located on Route 1, which is the main route between Boston and Providence, Norwood being south of Boston, Massachusetts, is that correct?

A. That is right.

Q. Now if that particular shipment were brought into your terminal at Gilbertville, will you explain the physical operation, assuming that the shipment was picked up at 4 o'clock in the afternoon.

A. It would be delivered the following morning.

Q. Where would the shipment be brought and would it be held over in any place?

A. Other lading going in that vicinity would be put on there since it was a half a load or thereabouts. Then it would proceed to Providence over any route that the driver chose to use.

Q. In other words, do I gather from that that if you had other freight for the Providence area, that shipment would be brought from Norwood, Massachusetts to Gilbertville and the other freight would be put on.

A. Gilbertville or Ellington.

[fol. 792] Q. I want to break down the question, first, to Gilbertville. It would be brought to the Gilbertville terminal and the other freight would be put on.

A. That is correct.

Q. When would the other freight be put on?

A. It would be put on that night.

Q. And that vehicle would then move from Gilbertville to where and when?

A. The first thing in the morning.

Q. And it would operate over any route that the driver—

A. Happened to choose.

Q. To?

A. To Providence or any other destination that he might have on the truck.

Q. Now if I asked you to explain the same shipment assuming it was brought into the Ellington terminal.

A. The same situation would prevail. The driver would go into Ellington.

Q. Direct from Boston?

A. Direct from Boston. He would observe the proper gateways at Sturbridge, Monson or Springfield, anywhere in that area there, and when he arrived at Ellington that evening, lading that may have come in from other Massachusetts points would be loaded on there for points in Rhode Island, any point in Rhode Island or, for that matter, lower Connecticut even, sometimes.

[fol. 793] Q. Now when the driver picks that up to bring it into Ellington, is he free to traverse any routes he desires?

A. He is free to the extent that he must go through any of the cities or towns of Southbridge, Holland, Wales, Hamden, East Longmeadow or Springfield when he comes over the state line.

Q. But you don't know just which one of those points the driver uses.

A. We don't specify routes.

Miss Kelley: I don't quite understand that last one, you don't specify routes; then why did you name all those points?

The Witness: Because those points are gateway points, Miss Kelley. It is a gateway point; I can go through any one of them.

Q. And then after the shipment is reloaded at Ellington that night, the following morning how does the truck get back to Providence?

A. The truck traverses any route that would be convenient for unloading other shipments either in Connecticut or Rhode Island.

Q. And for the most part, could he go directly to Rhode Island on an easterly route from Ellington?

A. Well; as I said, it varies according to what he has on the truck and what delivery he is making en route. There [fol. 794] is no line-haul involved there. His deliveries might take place all the way over.

Q. Now as far as you are concerned, do you know when a vehicle comes in from Providence or Boston or any other points just what routes the driver has taken?

A. I don't know exactly the routes because we cannot specify routes—we are an irregular carrier—but I have issued to the drivers specific instructions as to the towns that they must come through.

Q. And if a driver took a short cut at any one of those towns, would you have any way of knowing it unless you happened to catch him in the act?

A. Not unless I should catch him in the act and if I did, it would be one less driver I would have.

[fol. 796] Q. You testified that your company employed three dispatchers, will you tell us what terminal dispatchers are located at?

A. Yes, I can.

Miss Kelley: I object. This is repetitious. I am sure Mr. Barrett asked that question on cross examination before.

Mr. Barrett: I don't recall it has been asked.

Exam. Baumgartner: I can't remember whether it has been asked or not. It seems to me it has, but I think, it being a preliminary question, he should be permitted to answer.

The Witness: Three dispatchers, two at Rockville and one at New York.

By Mr. Barrett:

Q. Now at these other terminals that your company operates or that it shares with Nelson, who, if anybody, does the dispatching there?

A. Terminal manager.

Q. And you have how many of those?

A. Four.

Q. Withdraw the tail end of that question. It is already down you have got four terminal managers. And those terminal managers are located where?

A. Woonsocket, Rhode Island, Newton, Massachusetts, Gilbertville and New York.

Q. Can you tell us who does the predominant amount of [fol. 797] the maintenance and repair work on your company's vehicles?

A. International Harvester; we have independent people in New York; we have a mechanic in New York; we have it done with various international branches wherever they are located, and, of course, L. Nelson does repair work for us also.

Exam. Baumgartner: You were asking about maintenance, weren't you?

By Mr. Barrett:

Q. Maintenance and repairs, it was a general question. Now does your company operate a preventative maintenance program?

A. Yes, I would say we do.

Q. Are the trucks regularly inspected at so many hours and so many thousands of miles, greased and oiled and minor repairs made and all that sort of thing?

A. Well, I must confess that we don't do that as religiously as we should. I think that I would have to admit that is one of my failings.

Q. Is it ever done by your company?

A. Preventative maintenance, yes, it is to a certain extent, but as far as a religious program setup, I couldn't say that we have; that would be wrong because we don't really. We fix them up when they are broken; we do grease them and so on, but that is the extent of it, really.

Q. Now you do grease and oil them and check the tires and all that sort of thing regularly.

[fol. 798] A. Yes.

Q. And where is that done?

A. That is done at the various terminals or at the free-lancer garages or at International Harvester; Nelson does some of it, Nelson's garages.

Q. For the most part, is the work that is done by International Harvester on repairs and breakdowns where something actually goes wrong?

A. Well—

Q. I am asking is it a general rule now.

A. They handle any kind of a repair job regardless of what it is.

Q. I know what they do; I am asking you what they do for you.

A. Whether it is major or minor, they handle it for us.

Q. And do you send your vehicles to International Harvester to have them greased and the tires checked, etc.?

A. No, the drivers check the tires.

Q. And how about the greasing and oiling and those minor maintenance chores that go with operating a truck?

A. The drivers take care of that too, with the exception of greasing. Greasing, as I say, is taken care of by the shops, for instance, we have some gas stations that take care of them. It depends a lot on the station.

Q. And percentagewise, do you know how much of that [fol. 799] maintenance work is done by Nelson? Is it 50-50 or a minor part or what? Can you give us an estimate?

A. Well, there again, it would be difficult for me to estimate; I would hesitate to make an estimate.

Q. Would you say it exceeds 50 percent?

A. What exceeds 50 percent?

Q. Nelson does.

A. No.

Q. Would you say it exceeds 25 percent?

A. Well, I would say that it probably was around 25 percent of the work, roughly speaking, now; that is just an estimate.

Q. And that which is done by Nelson, is that predominantly done at Rockville, Connecticut?

A. Ellington, yes, that is correct.

Q. And your company has no mechanics stationed at Ellington.

A. No, we don't have any.

Mr. Barrett: That is all I have, Mr. Examiner.

Exam. Baumgartner: Mr. Bleakney.

By Mr. Bleakney:

Q. You discussed with Mr. Barrett, Mr. Nelson, some of your employees. I believe earlier on your direct you mentioned you had 10 office employees. Will you tell us where they are stationed and what their duties are.

A. That is correct.

Miss Kelley: I object.

Exam. Baumgartner: Have you already told us that?

[fol. 800] Mr. Bleakney: I don't believe where they are stationed.

Miss Kelley: I am sure he did.

Mr. Bleakney: Not according to my notes.

Exam. Baumgartner: It won't do any harm to answer the question. You may answer.

The Witness: They are stationed, the bulk of them, at Ellington, Connecticut.

By Mr. Bleakney:

Q. And the remainder?

A. The remainder would be at the various terminals where minor clerical functions are required.

Q. Could you specify a little more for us the bulk of them?

A. Yes. I have one girl in Gilbertville; I have one girl in New York.

Q. And the rest would be at Ellington?

A. Yes.

Q. And they perform routine clerical work, all these ten office people.

A. That is right, yes.

Q. And these are all full-time employees of your company.

A. Yes, they are.

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[fol. 802] Redirect examination.

By Miss Kelley:

Q. Now what instructions do you give your drivers as to traversing particular points or going between two points?

A. Well, I do not specify specific routes because of the fact that we are, basically, irregular route carriers, but I do have a notice posted at each terminal as to the points through which they must travel.

Q. Is that a notice on the bulletin board?

A. That is right, yes.

Q. In addition to the notice on the bulletin board, do your instructions take any other form as to how they must travel?

A. Verbal to the driver.

Q. Why does Gilbertville have in its files details with respect to equipment owned by L. Nelson?

A. Well, we lease equipment from the L. Nelson & Sons and it is essential that we show the proper motor numbers and serial numbers and so on on the leasing documents.

Q. Are there any other reasons for having such a list in the Gilbertville file?

A. That is the only reason.

Q. Why did Gilbertville purchase property in Springfield?

A. Well, I had been looking for property for a long time. I was just recently able to acquire a piece of land. It was my intention to move out of Ellington up to Springfield.

[fol: 803] Q. If this transaction is not approved and Gilbertville remains as a separate company, what use will be made of that Springfield property?

A. If this application is not approved, did you say?

Q. Yes, and the companies continue to operate separately.

A. If it is not approved, I am going to move out of Ellington and put up a terminal at Springfield.

Q. Have you completed your answer?

A. Yes.

Q. Now some questions as to how the operations are conducted. Does Gilbertville operate a direct service from and to New England points and New York?

A. Oh, yes.

Q. Would you tell us what points such direct service is rendered and how the vehicles are routed.

A. When you say direct service, I assume you mean—

Q. Without stopping, for example, at Ellington terminal.

A. Well, we operate directly out of Gilbertville, Boston and Woonsocket, Rhode Island.

Exam. Baumgartner: Just a minute, Miss Kelley, do you mean single-line service?

Miss Kelley: Yes. By direct service I meant single-line service.

By Miss Kelley:

Q. Now on the truck moving from Woonsocket and single-
[fol. 804] line service to New York, how is the truck routed?

A. Well, it would clear through the Hardwick gateway, Gilbertville gateway.

Q. And from Boston to New York?

A. Same thing.

Q. And Gilbertville to New York?

A. Same thing.

Q. A direct lead in.

A. Yes.

Q. Now in connection with the rents that are paid by Gilbertville to Nelson, did you hear the testimony of Mr. Solomon—and I believe Mr. Chilberg also testified—as to the amounts paid for rent by Gilbertville to Nelson?

A. Yes.

Exam. Baumgartner: You mean terminal rents?

By Miss Kelley:

Q. Terminal rents. For example, at Newton, Massachusetts, does the rent that is paid there, which I believe the testimony shows is \$100 a month, cover anything other than rents?

A. Yes, at Newton it covers telephone also.

Q. And how about Woonsocket?

A. At Woonsocket, the same thing.

Q. And do you know the amount of rent that Nelson pays, or did you hear the testimony here as to the amount of rent that Nelson pays for Woonsocket and Newton to Burgess & Co.?

[fol. 805] A. I remember hearing it but I forgot what it was.

Q. In addition to the rental payments, you also paid \$400 per month for telephone to Nelson's, is that correct?

A. Yes.

Exam. Baumgartner: You say in addition to the rental payments you pay \$400 a month for telephone service?

The Witness: I will explain that if you wish.

Exam. Baumgartner: I wish you would.

The Witness: At Woonsocket, the rental that we pay there includes the use of the telephone. At Newton, Massachusetts, it includes the use of the telephone; at Rockville, Connecticut, I have my own telephone so it does not cover that.

Exam. Baumgartner: Your records show, I believe, that at Newton you pay \$25 a month.

The Witness: A hundred dollars a month.

Exam. Baumgartner: Twenty-five Dollars a month.

Miss Kelley: No, a Hundred Dollars a month, Mr. Examiner.

Exam. Baumgartner: Since January 1, 1956.

Miss Kelley: Yes, he paid a Hundred Dollars a month since January 1, 1956, and prior to that time it was \$25.

Exam. Baumgartner: I made an error in my notes then.

By Miss Kelley:

Q. Was there any change in the space occupied by you at the various terminals either on or about January 1, 1956?

Mr. Barrett: Mr. Examiner, I want to object for this [fol. 806] reason, I can't recall any testimony on direct or cross relative to any changes in space of terminal, at Gilbertville, particularly, on cross. Now, apparently, counsel is going into some new fields that weren't covered on cross examination.

Miss Kelley: Frankly, it was a question that came to my mind as a result of the Examiner's confusion, and I think you may be right, Frank. It wasn't anything that I had in my notes at all, but it was just something that struck me because of your question and I thought it needed clarification on the record.

Exam. Baumgartner: Well, he was asked to explain the nature of his occupancy and the extent of his occupancy of these various terminals on cross examination, as I remember, and I think if there has been a change in that, why we want the facts on the record here.

The Witness: Yes, there was improved facilities at Newton and Woonsocket and at Rockville, as well.

By Miss Kelley:

Q. What do you mean by improved facilities?

A. For example, at Newton we didn't have any platform space at all; we just had the yard space plus the use of the phone, but we have improved facilities now so that we have

platform space there. At Woonsocket, the actual facilities weren't improved but the yards were improved and we were forced to pay more money too, and in Rockville, the same situation, we are using more space there.

[fol. 807] Q. Are your drivers union men or non-union men?

A. Yes, they are.

Q. Under your contracts with the union, do you guarantee them a certain number of hours per day?

A. Yes, eight hours is the guarantee.

Q. When you lease equipment from Nelson, is that equipment normally leased with drivers or without drivers?

A. Without drivers, normally.

Q. Now in a truckload of freight interchanged between Nelson and Gilbertville, can you recollect any instances where the Nelson driver continued on that truck?

A. No, sir. They couldn't.

Q. Why not?

A. They have got to have their eight hours sleep. When they come in, they couldn't. It would be an impossibility.

Q. So that if the vehicle that was used by a Nelson driver were bringing in a line-haul shipment containing a truckload that was to be interlined with your company, how would that be handled insofar as drivers, etc.?

A. Well, the shipment would be turned over to us. If it was a full load, it wouldn't be unloaded from the trailer, but if we had to lease equipment in order to move it to destination, we would simply request equipment. If they happened to give us the same tractor that pulled the load in, it would be immaterial to us; we wouldn't care what [fol. 808] they gave us. If it happened to be the same tractor, we would use it.

Q. Whose driver?

A. It would be our own driver, Gilbertville Trucking Co.

Q. Does the Gilbertville Trucking Co. handle shipments in single-line service originating at Rhode Island points destined to Connecticut points or vice versa?

A. No.

Q. How are those shipments handled?

A. Some of them are handled via Newton, Massachusetts; others might be handled via Worcester.

Q. What do you mean by Newton or Worcester?

A. That is where they would be interchanged or interlined.

Q. So that if any such shipments are shown in Exhibit B-7 or Exhibit 26 without showing an interchange point, is it your position that there has been an error in taking off the information on the pros?

A. That is true.

Exam. Baumgartner: May I make some inquiries on this Exhibit No. B-7? I notice quite a few shipments listed in Exhibit B-7 in connection with which no interchange point is shown. Are you now testifying that the failure to show the interchange point was an error?

The Witness: Where the interchange points are not shown, with respect to the shipments that Miss Kelley just mentioned, that is correct.

[fol. 810] Q. You were asked a question about repairs to Gilbertville equipment by L. Nelson & Sons Co. Do you know if Nelson charges Gilbertville more than Nelson's costs on such repairs?

A. Yes, they do, I know that.

Q. Can you tell us to what extent the charges to Gilbertville exceed the costs?

A. I know they are paying around \$2.00 an hour for their help or thereabouts.

Q. When you say "help," what class of help?

A. Mechanical help, and they are charging us \$3.00 per hour.

Q. And as far as parts are concerned, do you know whether or not they are charging—

Exam. Baumgartner: Just a minute, do you understand that that \$1.00 excess is a profit?

[fol. 811] The Witness: Well, I don't know.

Exam. Baumgartner: She is asking you about profit now.

The Witness: I don't know what else you could figure that to be. Charlie probably won't admit it is profit, but it is.

Exam. Baumgartner: Isn't there a great deal more involved than the mere employment of a mechanic and operation of a repair shop that has to come out of that dollar?

The Witness: That is probable.

Exam. Baumgartner: But you call it a profit. I want to be sure that you understand what you are talking about.

The Witness: Yes, I see. I realize, of course, that there is overhead coming out of that. To me, it looks like a dollar difference.

By Miss Kelley:

Q. And you think it is profit.

A. I think it is profit.

Q. Now as far as parts are concerned, do they furnish parts?

A. Yes they do occasionally.

Q. Do you know whether or not any profit is made with respect to the parts?

A. Yes, they charge us 10 percent above cost on the parts.

Q. Does Nelson bill Gilbertville regularly with respect to such repairs?

A. Yes, they do.

Q. For any repairs it may make to the Gilbertville equipment?

[fol. 812] A. Yes, they do.

Q. Mr. Barrett questioned you with respect to service to Wilmington and Philadelphia under specific authority to transport paper products.

A. Yes.

Q. Can you tell us how frequently Gilbertville rendered service under this portion of their authority to Wilmington and Philadelphia?

A. It would be on the average of a couple of times a month or thereabouts.

Exam. Baumgartner: That is service to those points.

The Witness: To and from those points, Mr. Examiner.

Exam. Baumgartner: Am I in error when I say that my recollection is that you didn't have any business out of Wilmington northward?

The Witness: I didn't say that.

Exam. Baumgartner: I am mistaken then. Telephone service?

The Witness: Telephone service, right. As a general rule, when we handled a load down to Wilmington, we would handle a load back.

By Miss Kelley:

Q. Are these paper products handled for more than one account or is it one account?

A. Oh, yes, we handled for more than one account.

Q. And you serve those accounts, whatever they may be, as far as Philadelphia and Wilmington.

[fol. 813] A. That is correct.

Q. Would it normally be truckload traffic from Philadelphia to Wilmington?

A. Yes, it would be.

Miss Kelley: That seems to be all I have, Mr. Examiner.

Exam. Baumgartner: Mr. Mueller in recross.

Recross examination.

By Mr. Mueller:

Q. Why did you say that Gilbertville has a list of the Nelson equipment in its files?

A. I said we had a list of Nelson equipment available so that we would have a knowledge of the identity of those vehicles such as the motor numbers and serial numbers and so on.

Q. That was done, I suppose, to facilitate leasing when it is necessary.

A. That is right, yes. We use that information for the lease document.

Q. Now are written leases used between the two companies?

A. Yes.

Q. And who, on behalf of the Gilbertville Trucking Co. is authorized to execute such leases?

A. Any of the terminal managers.

Q. The dispatchers?

A. And the dispatchers.

Q. Any other officer?

[fol. 814] A. Yes, traffic manager.

Q. And you yourself, I suppose.

A. Oh, yes.

Q. Any of the clerks?

A. Yes, some clerks have authority.

Q. In addition to the written leases, is some other document executed at the time the vehicle lease is executed?

A. The inspection of the vehicle; we make an inspection of the vehicle.

Q. And do the same parties that you have just mentioned execute those inspection reports?

A. As a general rule, that is correct.

[fol. 815] Exam. Baumgartner: Let me put the question. Do you mean that the drivers employed by Nelson are sometimes employed by you and on your payroll from an interchange point?

The Witness: Now as far as my using a Nelson employee, I will use a Downing & Perkins employee; I will use any truckman's employee who happens to be available to me if the need arises, a spare man, in other words.

Exam. Baumgartner: Well, who pays him at the time he is working for you?

The Witness: I pay him; Gilbertville Trucking pays him.

Exam. Baumgartner: Is he on your payroll?

[fol. 816] The Witness: He is on my payroll if he goes to work for me; I pay him.

Exam. Baumgartner: That is what occurs when there is an interchange of equipment and the driver goes along.

The Witness: No, that only occurs when I am short on men.

[fol. 817] By Mr. Mueller:

Q. Very well. You testified that you sometimes take over Nelson equipment at Ellington, Connecticut.

A. Lease it, you mean.

Q. Lease it at Ellington, Connecticut, for delivery to a point on the Gilbertville line.

A. On my line, yes.

Q. And I want to know whether or not a Nelson driver drives that equipment beyond Ellington.

A. No, sir.

Q. I am not talking about the driver who brought the shipment or brought the truck to Ellington, we'll say from a point on the Nelson line.

A. A Nelson driver does not drive that equipment.

Q. By that do you mean that man is not your driver because he is on a Nelson payroll or just how is it handled?

Miss Kelley: Mr. Examiner, I do have objections to the question.

Exam. Baumgartner: Your objection was running.

[fol. 818] By Mr. Mueller:

Q. Let's go back just a little bit: you have a piece of Nelson equipment that you are going to take over at Ellington, Connecticut.

A. That I am going to lease.

Q. Suppose you don't have a driver available at Ellington?

A. Then I hire a man and I don't care who he belongs to.

Q. He may be a Nelson driver?

A. It might be, but I hire him and I pay the bill and I pay for his wages.

Q. And to facilitate that process, I will ask you again whether you keep a list of the Nelson drivers available in your office.

Miss Kelley: I object; it is immaterial to this case.

Mr. Mueller: Mr. Examiner, it is perfectly germane to the inquiries that have been made here.

Miss Kelley: What is the materiality to an application case as to what—

Mr. Mueller: It is perhaps a question in fitness.

Exam. Baumgartner: Well, I think that is a good deal like the question awhile ago whether or not they maintained an equipment list and part and parcel of the same thing, and there has been some testimony about that. I think I will let him answer, but subject to your objection, Miss Kelley.

The Witness: We maintain a list of spare men of not only Nelson Co. but any other carrier; in other words, men who may be working for Nelson or for any carrier in the [fol. 819] particular area involved. If we need a man, we call the best one on the list and that is the one we use. We don't care whether he has worked prior for Nelson, or for the King of England for that matter. We hire him and use him.

By Mr. Mueller:

Q. I understand you trip lease from Nelson from one to six units a day.

A. Yes.

Q. And how often in a week's time would you use, in a normal operation, a driver on such leased Nelson equipment who was not regularly employed otherwise by the Nelson Company?

Miss Kelley: I object to that question, too, for the same reasons. I state further, I don't understand the question.

The Witness: I don't understand it either.

Exam. Baumgartner: What was your question again?

Mr. Mueller: I want to know, Mr. Examiner, as to these units of equipment, one to six a day, they lease from Nelson, how often those units are driven by drivers who would normally be employed by other truck lines other than Nelson or Gilbertville, let's put it that way.

Exam. Baumgartner: Now do you understand the question?

The Witness: You mean men other than regular employees, spares, so-called? You are referring to spare men that come in from the union hall or from—

[fol. 820]

By Mr. Mueller:

Q. Do you hire from the union hall?

A. I hire from the union hall, sure.

Q. Regularly?

A. Well, we have the privilege of calling the men direct, which is not accorded most outfits. We can call the men direct, put them to work directly. In other words, we can have the list and call whoever we please and if they are available for work, we put them to work. It is apt to be a Nelson man.

Q. It is apt to be a Nelson man. How often it is a Nelson man?

A. Well, it might be a Nelson man often if he is available. We don't care.

Q. Would you give preference to the Nelson man?

A. We sure would because they are good men, generally speaking.

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[fol. 821]

By Mr. Barrett:

Q. On redirect, you stated you gave these instructions as to gateways in two different methods. Now does your prior testimony still stand that whether or not the driver follows the instructions is unknown to you unless per chance you catch him doing something wrong?

A. That is true.

Q. Is your payment of \$400 per month for the telephone service to Nelson a check separate from any other payments?

A. No, it wouldn't be. If it is billed to us, it would be separately, of course. On occasion, it could be paid separately or it could be paid with other charges that they have against us.

Q. Who signs the checks for your company?

A. For my company?

Q. Yes.

A. Kenneth Nelson.

Q. That is you.

[fol. 822] A. That is me.

Q. Now do you know, when you sign checks payable to

the Nelson Company, whether or not the \$400 for the telephone services is separate and distinct from any other billings they might make to you?

A. Oh, yes.

Q. It is separate?

A. Yes, it is.

Q. And this rent that is paid by your company to Nelson, is that separate from any other payment?

A. That is separate, too, yes.

Q. And at the present time, that monthly amount is how much, do you recall?

A. I believe I testified to that.

Miss Kelley: Monthly amount of rent?

Mr. Barrett: Yes.

Miss Kelley: I object; that has been clear in the record; it has been put in by every witness.

Exam. Baumgartner: I think he has asked for the combined amount, telephone service, terminal rent, etc.

Miss Kelley: Do you want to make the computation?

Exam. Baumgartner: Give us an approximation.

The Witness: A Hundred Dollars at Woonsocket, \$100 at Newton, \$100 at Rockville and \$250 at New York.

By Mr. Barrett:

Q. That is \$550 a month, if my addition is right.

[fol. 823] Exam. Baumgartner: Addition of what?

Mr. Barrett: In addition to the \$400.

By Mr. Barrett:

Q. Now do you make a separate check payable to the Nelson Co. in that amount or in that vicinity for rent?

A. I wouldn't necessarily say that it would be a separate check, no, not necessarily.

Q. Is it a separate check?

A. No, I wouldn't say that it is.

Q. What else is combined with that \$550 for rent?

A. Other billings, might be for repairs or for anything that we purchase.

Q. Repairs or parts.

A. Yes.

Exam. Baumgartner: I don't know; I have some difficulty, Mr. Barrett, in seeing what difference it makes whether he writes one check or three or five.

Mr. Barrett: We had it in the record, I thought, fairly clear that Gilbertville paid to Nelson \$400 for telephone services. Then she brings up the fact in addition to telephone services, certain rental payments included telephone or vice versa. Now I am just trying to ascertain specifically how much was made payable to Nelson for telephone as against how much for rent.

Exam. Baumgartner: What is the difference whether it [fol. 824] is written in two or three checks or one check? Why don't you ask specifically, is there a specific billing. What does the billing show?

By Mr. Barrett:

Q. What does the billing show?

A. The billing would show \$400 for the telephone service and the separate terminals would be separate, that is, the rentals for the terminals would be separate.

Q. And what do the billings for the terminals show, how much for rent?

A. One Hundred Dollars for—

Q. Broken down separately?

A. Yes, they would be.

Q. Now do you review these billings as they come in from Nelson?

A. Yes, I do.

Q. On the average, can you recall how much you paid Nelson for repair bills and parts?

A. Repair bills and parts?

Q. Yes.

Miss Kelley: I object. I can't see the materiality of that, Mr. Examiner. He has given a proportion before and I didn't ask anything on redirect with respect to these bills because Mr. Barrett had asked him a number of questions on the point of the proportion of his repairs done by Nelson, etc.

Mr. Barrett: If I could call the Examiner's attention [fol. 825] to the fact that Miss Kelley, on her redirect

examination, elicited from the witness the fact that Nelson, as far as this witness knew, paid its mechanics \$2.00 and they billed Gilbertville \$3.00 and that they marked up the cost of their parts 10 percent when they did repair work on Gilbertville vehicles. Now I am sure the Examiner calls that to mind on redirect examination.

Exam. Baumgartner: Yes, I recall that.

Mr. Barrett: This question is directed for that specific testimony, if he knows how much his company, Gilbertville, pays to the Nelson Co. for this repair work at \$3.00 an hour for mechanics and the 10 percent markup in parts.

Exam. Baumgartner: Over what period of time?

Mr. Barrett: I am asking if he can give it for any period, a week or month.

The Witness: I couldn't give you a fair estimate.

By Mr. Barrett:

Q. Is it paid weekly or monthly?

A. It is billed on a weekly basis and usually paid on a monthly basis.

Q. And do you know specifically how much is billed on an average weekly?

A. Well, of course, that would vary with the degree of need.

Q. Can you give us any minimums or maximums?

A. No, I am afraid that I couldn't.

Q. Then it is your testimony you don't know how much [fol. 826] you pay Nelson for repairs and parts.

A. Oh, I wouldn't say that. I am not saying that.

Q. Do you know?

A. But I couldn't make an estimate for a period of time because of the fluctuation. It stands to reason that if you have an unusually heavy period where you are using your equipment hard, you will have more repairs and then you might run into a spell where you don't have any major work done. It fluctuates.

Q. Do you know how much you paid Nelson for repairs and parts for Gilbertville vehicles?

Miss Kelley: I object.

By Mr. Barrett:

Q. You stated you couldn't give it to me in any period, but you certainly did know. Now I am just asking you, do you know?

A. Do I know for what period?

Q. I am not giving any period; I say, do you know how much you paid to them?

A. Yes, I certainly do.

Q. How much?

Miss Kelley: I object to the question.

Exam. Baumgartner: That is a very indefinite question and a very indefinite answer. Let's get down to brass tacks here. He says, "Do you know," and you say, yes, you do know.

The Witness: Well, I can't give him an estimate.

[fol. 827] Exam. Baumgartner: Now suppose I am a buyer and I come to you and say, "Mr. Nelson, I understand you use Nelson for making repairs to your vehicles; among other items of expense, can you give me some idea how much you pay Nelson monthly, can you give me a rough idea," and what would you say?

The Witness: Well, I would say around Three or Four Hundred Dollars.

Exam. Baumgartner: Well, now, that is better. In other words, I don't like this sparring between counsel and the witness and we are getting no place.

The Witness: I don't mean to spar, Mr. Examiner.

Mr. Barrett: Mr. Examiner, I want to state on the record that I did not intend to spar with the witness. If you recall, one of my first questions was, could he give me an estimate as to the monthly amounts that he paid for repairs and parts.

Exam. Baumgartner: I know that. You asked him three or four questions along that line and my impression was that you were sparring with each other.

Miss Kelley: Mr. Examiner, on that point, can I ask just one thing, when he said Three or Four Hundred Dollars, is that an average?

Exam. Baumgartner: That is what he said; I asked him.

Miss Kelley: Thank you.

By Mr. Barrett:

Q. Now you stated that you did not transport any traffic between points in Rhode Island and points in Connecticut [fol. 828] unless it was interchanged.

A. That is right.

Q. And your counsel stated that she hurriedly went through Exhibit B-7 and Exhibit 26 and could find no other than the one we previously talked about where there was an interchange at Marlboro, Massachusetts.

A. Yes.

Q. I show you delivery receipt No. 68046 dated 5/7/56. It shows a shipment of one carton of tennis string shipped from Rockville, Connecticut to Pawtucket, Rhode Island. Does that show any interchange carrier?

A. It doesn't show any interchange carrier on it.

Exam. Baumgartner: What is the weight of the shipment?

The Witness: Thirty-six pounds.

By Mr. Barrett:

Q. I show you a second one dated 3/8/55, No. 15882. Is that a shipment from Bridgeport, Connecticut to Providence, Rhode Island, weighing 694 pounds?

A. Yes.

Q. Being the commodity set-up boxes.

A. Yes.

Q. Does that show any interchange with any other carrier?

A. No, it does not.

Q. Do you recognize trailer numbers or truck numbers at the bottom?

A. Yes.

[fol. 829] Q. Do you know whether or not those are your numbers or not?

A. That wouldn't be my number; that is too high.

Q. Do you know whether it is a Nelson number?

A. It looks very much like a Nelson number.

Q. Neither of those brochures show an interchange carrier.

A. They do not show an interchange carrier, but they may well have been interchanged with Andrews & Pierce at Boston or Nemasket. There is a division shown I note on this one, 15882, and on 68046 I note that there is no division on that one.

Q. But nothing on the face of the bill.

A. There is nothing on the face of the bill that shows it has been turned over to a connection.

[fol. 830] Further redirect examination

By Miss Kelley:

Q. What is the practice with respect to spare drivers as you mentioned?

A. What is my practice?

Q. Yes.

A. I maintain a substantial list of spare drivers.

Exam. Baumgartner: Miss Kelley, I think he has gone over that ground pretty thoroughly.

Miss Kelley: There was a question by Mr. Mueller with respect to it and I personally feel that it needs clarification. [fol. 831]

Exam. Baumgartner: Will you ask him a specific question instead of asking him a broad question. What is his practice with respect to spare drivers; an explanation of that might take a half an hour.

By Miss Kelley:

Q. The spare drivers, are they normally the men that are on the bottom of a seniority list according to the union dues?

A. That is right.

Q. Now is it a common practice for those so-called spare drivers to work for more than one trucking company?

Mr. Barrett: I object.

Exam. Baumgartner: You may answer.

The Witness: Some of them make their entire livelihood by going from truckman to truckman. They work a day

here and a day there and take the whole week working for five different carriers.

By Miss Kelley:

Q. Now might that man work for Nelson during a week and work for Gilbertville during a week and some other carrier?

A. Yes, he might.

Q. Do you know the drivers that have been hired by you as spares that have worked for Nelson as well as other companies during a particular week?

A. Yes.

[fol. 832] Q. If you do not have work for a driver on a particular day, do you pay that driver or call him in to work?

A. No, we call and tell him not to come to work.

Q. And do you have any strings on a driver to prevent him from working for any other trucking company?

A. No.

Q. And is that true with respect to any spare drivers that you may call?

A. That is right. That is industry practice, by the way.

Q. What?

A. Industry practice to call men.

Miss Kelley: I misunderstood the word. That is all I have.

Exam. Baumgartner: Mr. Witness, you may be excused, subject to recall by Miss Kelley.

(Witness excused.)

Miss Kelley: I wish to offer Exhibits 25 and 26.

Exam. Baumgartner: Exhibits for identification No. 25 and 26 have been offered in evidence. Is there any objection? There being no objection, they will both be admitted in evidence.

(Applicant's Exhibits No. 25 and 26, Witness Kenneth A. H. Nelson, were received in evidence.)

[fol. 835] Mr. Mueller: Mr. Shea, please take the stand.

EDWARD D. SHEA was sworn and testified as follows:

Direct examination.

[fol. 836]

By Mr. Mueller:

Q. Will you state your name for the record.

A. Edward D. Shea.

Q. What is your employment, Mr. Shea?

A. Safety Inspector and Special Agent of the Interstate Commerce Commission.

Q. Where is your office?

A. 824 Post Office Building, Boston, Massachusetts.

Q. How long have you been employed by the Interstate Commerce Commission?

A. Fifteen years.

Q. Prior to that, did you do some work in an investigative nature?

A. Yes, for 12 years an investigator in the Massachusetts Registry of Motor Vehicles.

Q. Has the Interstate Commerce Commission issued certain credentials to you in your capacity as a special agent and safety inspector?

A. They have.

Q. In your official capacity, Mr. Shea, have you made certain investigations of the things that have been before the Commission in this proceeding?

A. I have.

Q. Will you state where and under what circumstances the affairs of these companies first came to your attention.

A. On October 21, 1954, about 8 p.m., on U. S. 20 in [fol. 837] Westfield, Massachusetts, I observed a tractor semi-trailer unit owned by the L. Nelson & Sons Trucking Co., Inc. of Rockville, Connecticut displaying paper placards on each side of the tractor reading "Leased to Gilbertville Trucking Co., Inc., Gilbertville, Massachusetts, MCH7431."

Q. Did you do anything about this; was your curiosity aroused?

A. The next morning I discussed with District Supervisor LaCour at our Springfield, Massachusetts office my observation.

Q. That would be October 22.

A. That is right, and he told me that early in 1953 a Mr. Kenneth Nelson, who was formerly connected with the L. Nelson Trucking Co.—

Exam. Baumgartner: Just a minute.

Miss Kelley: Object to the hearsay nature of the testimony.

Exam. Baumgartner: Objection sustained.

Mr. Mueller: He is relating a conversation, Mr. Examiner, of Mr. LaCour, who is here.

Exam. Baumgartner: He shouldn't testify to what he was told. He can testify that there was a conversation and state the subject of the conversation, but I don't think he should be permitted to repeat what Mr. LaCour told him.

By Mr. Mueller:

Q. Very well. As a result of your conversation with Mr. LaCour, did you do anything?

[fol. 838] A. Yes. That same day, about 1 o'clock p.m., I went to Gilbertville, Mass. and attempted to locate the offices of the Gilbertville Trucking Company.

Q. Did you find them?

A. I could not locate them. I went to the Post Office and inquired at the Post Office and I was told there that the Gilbertville Trucking Company's terminal was located at the Ware, Massachusetts airport.

[fol. 842] By Mr. Mueller:

Q. Did you make an investigation of some of the practices and procedures of the Gilbertville Trucking Co. on the occasion of this visit?

A. Yes, I made a safety survey, survey of the carrier.

Exam. Baumgartner: On what date?

[fol. 843] The Witness: October 22, 1954.

By Mr. Mueller:

Q. Were there any lists of drivers on file?

A. Yes.

Miss Kelley: I object to this. The point at which the survey was made has not been identified.

Exam. Baumgartner: Yes, I think he stated the point, didn't you?

The Witness: This was at the Ware, Mass. airport, Ware, Mass.

By Mr. Mueller:

Q. And there was a terminal building of some kind?

A. An airplane hanger converted into a trucking terminal.

Q. What did you ascertain as to the number of drivers employed by Gilbertville?

A. There were six drivers employed.

Q. Did you study the file of the drivers' medical certificates, and if so, what did you find?

A. I found that they had a doctor's certificate for one driver, I think, and no doctors' certificates for the other drivers.

Q. Now did you make any effort to investigate payroll records and what was the result of that effort?

A. I asked to check payroll records and found that the payroll records were all maintained at Rockville, Connecticut.

[fol. 844] Q. Did you examine the drivers' log files?

A. They had drivers' logs, I think, for only two drivers. There were no logs on file for drivers Smith, Nusuata, Seddler and LeMay. I also found they had no doctors' certificates on file for drivers Walters, Smith, Nusuata, Seddler and LeMay.

Q. Were you able to examine any pros or freight bills at the Gilbertville terminal?

A. I was shown a file of Gilbertville pros, which were prepared in longhand, on outgoing shipments only. There was a bill of lading attached to the back of each pro. There were no pros or other records of incoming shipments on file at this terminal.

Exam. Baumgartner: What do you mean by incoming shipments?

The Witness: Shipments that were received at that terminal for further transportation.

By Mr. Mueller:

Q. Did you examine any motor vehicle equipment on the occasion of that survey on October 22, 1954?

A. Yes, I found that the carrier owned two trucks, five tractors and eight semi-trailers.

Exam. Baumgartner: As of what date?

The Witness: That is on 10/22/54, they owned two trucks, five tractors and eight semi-trailers and they leased, on that particular day, six tractors, semi-trailers from the L Nelson Trucking Company. I observed on the premises in the yard [fol. 845] while I was there—

Miss Kelley: I object. It appears to me that question is answered and Mr. Shea is volunteering further information.

Mr. Mueller: Let him finish, Mr. Examiner.

The Witness: I observed standing in the yard four L Nelson & Sons semi-trailers, T90, T82, T58 and T128, standing in the yard empty, and one tractor semi-trailer owned by Gilbertville in the yard. In the office, while I was making my survey, I saw a list of equipment which I found was a list of equipment owned by the L Nelson Transportation Company, Inc., listing these vehicles by registration plate number, vehicle number, make, type serial number. This list included trucks, tractors and semi-trailers. I also saw a pile of leases.

Miss Kelley: I object. There is no question pending before this witness.

Exam. Baumgartner: Let's stop this wandering in testimony.

By Mr. Mueller:

Q. What else did you look into on the occasion of your visit on October 22, 1954 to the Gilbertville terminal?

A. I inspected a file of leases of vehicles between the L Nelson Company and the Gilbertville Company.

Miss Kelley: May I see the paper that Mr. Shea is reading from, Mr. Examiner?

(Miss Kelley examined the document from which the Witness was reading.)

[fol. 846] By Mr. Mueller:

Q. Had you finished your answer, Mr. Shea?

A. No, I had not.

Q. Continue, please.

A. These leases showed a flat rate.

Q. In what amount or amounts?

A. Fifteen, Twenty and Twenty-five Dollars. I am looking for my notes here now.

Exam. Baumgartner: Just a minute, he hasn't finished his answer, I don't think. "Showed a flat rate of Fifteen, Twenty and Twenty-five Dollars," that doesn't mean anything so far.

The Witness: The lease of a vehicle from Gilbertville to New York City showed \$25 for payment of that lease. They are all on flat rate fixes, \$15, \$20 and \$25.

By Mr. Mueller:

Q. Does that figure seem to vary dependent upon the origin or destination of the trip?

Miss Kelley: I object to the leading nature of the question.

By Mr. Mueller:

Q. Very well, tell us what else you saw.

A. These leases were to various destinations and various originating points and the payment varied according to the length of the trip.

Q. Now, Mr. Shea, as a result of findings made on October 22, 1954—

Exam. Baumgartner: Just a minute; have you covered [fol. 847] the ground there? What kind of equipment was leased, a tractor and trailer or truck or trailer alone or what at these rates?

The Witness: Those that I recall were tractor semi-trailers, complete units.

By Mr. Mueller:

Q. Did you subsequently conduct further investigation at Ellington, Connecticut? Just answer yes or no, Mr. Shea.

A. Yes.

Q. And can you give us the date of that investigation?

A. November 9, 1954.

Q. And who were you with?

A. With District Supervisor LaCour.

Q. And where did you go?

A. We went to Ellington, Connecticut.

Q. Did you enter the premises occupied by L Nelson & Sons?

A. Yes, we did.

Q. Can you describe them briefly?

A. This is a white farmhouse-type building with a large barn or tobacco shed out in the back, which we later found was a terminal. We entered at the rear door into a large room.

Q. This was in the white house?

A. In the white house on the first floor. We entered this large room, which had a bulletin board over to one side and we observed a man sitting at a desk operating a teletype machine and answering telephone calls and also issuing [fol. 848] orders over an intercom system to some one.

Q. And who was that man?

A. That man I later found out was Kenneth Nelson.

Q. Were these premises that you have described in any way marked to show occupancy by L Nelson & Sons Transportation Co.?

A. Yes, there was a sign and we saw these L Nelson vehicles all over the yard.

Q. Now did you say there was a teletype machine in the room?

A. There was.

Q. Was there something about that machine that attracted your attention?

A. Yes. I observed there was maybe two or three yards of this wide teletype paper covered with messages that

rolled out of the back of the machine down to the floor in back of the machine.

Q. Did any one handle this tape?

A. Yes, Mr. Kenneth Nelson tore it off the machine and folded it up very carefully.

Exam. Baumgartner: Who did?

The Witness: Mr. Kenneth Nelson.

Exam. Baumgartner: Was he the man that was operating the machine?

The Witness: He was.

By Mr. Mueller:

Q. Did you later have occasion to ask Mr. Nelson for [fol. 849] permission to inspect this teletype tape?

A. I did.

Miss Kelley: I object.

Exam. Baumgartner: What is the objection?

Miss Kelley: The objection is "did you later." We have got a date, as far as I can understand, of November 9, 1954.

By Mr. Mueller:

Q. Well, I will clarify the question. Did you later on that day, namely, November 9, 1954, have occasion to ask Mr. Nelson for permission to look at the teletype tape you have described?

A. Yes, about twenty minutes later.

Q. And with what results?

A. About thirty minutes later on the same day I asked Mr. Kenneth Nelson to produce the teletype tape that he had taken out of the machine for my inspection and he told me he had destroyed it.

[fol. 850] By Mr. Mueller:

Q. Did you make any comment to Mr. Nelson regarding preservation of those records?

A. I showed Mr. Nelson a copy of the Commission's rules for the preservation of records and called his specific attention to the item which required teletype messages to be

retained for a period of three years, and again demanded that he produce the teletype records.

Q. Did he do so?

A. He did not.

Exam. Baumgartner: Which teletype record?

The Witness: That I had observed in the back of the machine.

Exam. Baumgartner: After he had told you he destroyed it.

[fol. 851] The Witness: I again made a demand on him to produce it.

Exam. Baumgartner: What did he tell you upon your second demand?

The Witness: He said, "I have destroyed them."

Exam. Baumgartner: He told you that twice?

The Witness: That is right.

Miss Kelley: My objection stands.

Exam. Baumgartner: Yes, I understand you have got a running objection based upon hearsay.

By Mr. Mueller:

Q. Mr. Shea, when you first came upon the premises on November 9, 1954, was Mr. Clifford Nelson present?

A. He was not.

Q. Did he come to the premises at some time during the day?

A. He did later that afternoon, that same day.

Q. Was Mr. Chilberg there?

A. No, sir, Mr. Chilberg was not there during our visit that day, Mr. Charles Chilberg.

Q. Did you meet a Mr. Seiferth?

A. Yes, I did.

Q. Did you ascertain what his job was there?

A. He was a dock foreman.

Q. A dock foreman in the employ of whom?

A. L Nelson & Sons.

Q. Did you observe any activities of Mr. Seiferth and Mr. Kenneth Nelson?

[fol. 852] A. Mr. Kenneth Nelson issued some instructions over the intercom system down to the dock to Mr. Seiferth and instructed him to bring a certain vehicle up to the office.

When Mr. Seiferth brought the vehicle up to the office, Mr. Kenneth Nelson then told him to take it back down again.

Exam. Baumgartner: To the dock?

The Witness: Back to the dock. That is a large white building.

Exam. Baumgartner: On the same premises?

The Witness: On the same premises, about a hundred yards in back of the office building.

Exam. Baumgartner: Connected with the teletype?

The Witness: No, intercom system.

By Mr. Mueller:

Q. Now did you find a portion of these premises were also carrying some designations as being occupied by the Gilbertville Trucking Company?

A. We later went upstairs; went through the downstairs part of the house and upstairs and through two other offices and then away over to one side of the building, which looked like it was a small bedroom, we found the office of the Gilbertville Trucking Company, and pasted on the door of that room was one of the paper placards used on the trucks, which said, "Operated by Gilbertville Trucking Company, Gilbertville, Massachusetts, MC No. so and so."

Q. Was that office occupied?

[fol. 853] A. There was no one there that day.

Q. Did you observe the conduct of Mr. Kenneth Nelson in relation to any other Nelson employees on that day?

A. Yes, on two separate occasions I observed Mr. Kenneth Nelson issuing instructions, three times in our presence, to Mrs. Marjorie Edwards, whom we later found was in charge of the L Nelson & Sons Co. office.

Q. Now did you make any checks of records filed in the office designated as that of Gilbertville's?

A. Yes, we did.

Q. Did you check doctors' certificates?

A. I did.

Q. Did you check payroll records of Gilbertville?

A. Yes, I did.

Q. Time clock?

A. I did.

Q. Cards?

A. Yes.

Q. Now did you also, during the day, make a similar check of Nelson records?

A. I did.

Q. Have you a comment to make on the result of those checks?

Miss Kelley: I object to such a broad question. It does not give me the proper opportunity to object to the answer and all of these questions—

[fol. 854] Exam. Baumgartner: Let's take one type of record at a time, Mr. Mueller.

By Mr. Mueller:

Q. What did you observe as the result of checking the files of doctors' certificates of the two carriers?

A. We found that the Gilbertville files had a complete file of doctors' certificates of all the L. Nelson & Sons drivers.

Q. What did you find as a result of checking the payroll records?

A. We found numerous instances of the same driver working during the same payroll week for both L. Nelson & Sons and Gilbertville Trucking Company.

Q. What about the use of the time clock?

A. There was a time clock down on the first floor in this drivers' room I first described and we found that the Gilbertville drivers and the L. Nelson drivers both used the same time clock.

Q. Did you make any attempt to ascertain whose time clock this was, who it belonged to?

A. I don't recall.

Q. Did you inquire into or examine records pertaining to interchange of shipments between these two carriers?

A. Yes, we did.

Q. Will you comment on that, please.

Exam. Baumgartner: I think that is a little bit too broad, [fol. 855] Mr. Mueller.

Miss Kelley: I object.

Exam. Baumgartner: You are inviting just a rambling statement and not giving Miss Kelley a proper opportunity to object.

Mr. Mueller: I assume Miss Kelley is well able to take care of her client's interest.

Exam. Baumgartner: How can she if the witness just sits here and narrates a lot of things?

By Mr. Mueller:

Q. What did you discover as a result of looking at the billing forms used by the two carriers?

A. They were identical in form except for the names at the top which were different.

Exam. Baumgartner: What document was identical in format?

The Witness: The freight bills or pros were identical in size and form and format with the exception that the names at the top of the freight bills and pros were different.

By Mr. Mueller:

Q. Did you inquire into the divisions of revenue on interchanges between Gilbertville and Nelson?

A. Yes, I did.

Q. Will you state what you found?

Miss Kelley: I object. Did he check records as to this? I mean his inquiry, Mr. Examiner, I submit is not sufficient.

Exam. Baumgartner: Of whom did you make your inquiries, Mr. Shea?

[fol. 856] The Witness: Mr. Kenneth Nelson.

Exam. Baumgartner: You did make inquiries. This is not a question of inspecting records.

The Witness: And we inspected records too.

Exam. Baumgartner: You did both of them. All right.

Miss Kelley: Mr. Examiner, I object, then, as to his comments on the basis that it is hearsay, and as far as the records are concerned, I believe we have the right to have those records identified Mr. Shea claims he inspected.

Exam. Baumgartner: I agree with you as to part of your objection that you have got a right to state what records they were, but I can't see any hearsay so far.

Miss Kelley: It sounds like it to me.

Exam. Baumgartner: Well, maybe there will be some, but let's wait. He hasn't asked him what Mr. Nelson told him yet.

By Mr. Mueller:

Q. Did Mr. Nelson tell you how the revenues were divided?

Miss Kelley: I object.

Mr. Mueller: May he answer yes or no?

Exam. Baumgartner: Yes, you may answer yes or no.

The Witness: Yes, he told us.

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[fol. 858] By Mr. Mueller:

Q. Mr. Shea, what records did you look at with respect to the subject of interchanges between these two carriers?

A. We checked pros and interline settlement accounts.

Q. And what did you find?

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[fol. 859] Exam. Baumgartner: Well, you checked pros and interline settlement accounts, were they for the year 1898 or what?

The Witness: We looked at the records for the year 1954.

Exam. Baumgartner: All right.

By Mr. Mueller:

Q. What did you find with respect to which of the carriers was billing charges?

A. We found that the L. Nelson Company was doing all the billing of these interline shipments.

Exam. Baumgartner: Which interline shipments?

The Witness: On interline shipments between Gilbertville and L. Nelson.

By Mr. Mueller:

Q. Would L. Nelson do the billing regardless of which carrier delivered the shipment?

A. Yes.

Q. And that would be so with both prepaid and collect shipments.

A. Yes.

Q. Now I asked you before whether Clifford Nelson was present when you first arrived, and I believe your answer was no.

[fol. 860] A. No.

Q. Did he come to the terminal some time during the day?

A. He did.

Q. At what time of day?

A. Later, that afternoon.

Q. And did you talk with him on that afternoon?

A. I did.

Q. Did you ask him where Mr. Charles Chilberg was?

A. Yes.

Q. Did you question Mr. Clifford Nelson concerning your observations about the activities of his brother Kenneth in and about the Nelson terminal on that day?

A. I did.

Q. What was said?

Miss Kelley: I object.

Exam. Baumgartner: Now on that, I can't rule until I hear the answer as to whether or not it falls within the hearsay rule or without.

The Witness: I asked Clifford Nelson to explain to me how his brother Kenneth Nelson happened to be directing the operations of the L. Nelson & Sons Company's business, and also by what further right he was destroying teletype records which belonged to the L. Nelson & Sons Transportation Company.

By Mr. Mueller:

Q. Did he answer you?

Miss Kelley: I object to that because it clearly results [fol. 861] in hearsay, Mr. Examiner.

Exam. Baumgartner: I am not sure until I hear it now.

The Witness: He could not explain it. I mean by "he," Clifford Nelson could not explain the activities of his brother Kenneth.

Exam. Baumgartner: What about the other half of that double-barrel question?

By Mr. Mueller:

Q. What did he say about the teletype?

A. He couldn't explain any of the activities of his brother; he could offer no explanation.

Exam. Baumgartner: All right.

By Mr. Mueller:

Q. Now did you examine some of the corporate records of the L. Nelson & Sons Transportation Co. on that day, Mr. Shea?

A. I did.

Q. And did you look at the stock record book?

A. I did.

Q. And you have heard testimony here during the course of these proceedings on the subject of stock holdings in the L. Nelson & Sons Transportation Co.?

A. I have.

Q. Were the answers given consistent with what you observed?

A. They were.

Q. Mr. Shea, did the investigation and inspection which you began on November 9 extend over more than one day?
[fol. 862] A. It did.

Q. Did you revisit the premises on the 10th of November?

A. We did.

Q. Did an incident occur in the course of your trip back to the Nelson terminal at Ellington which you now recall?

A. Yes.

Q. Will you tell us when and where the incident occurred.

Miss Kelley: I object. It is altogether too broad a question.

Exam. Baumgartner: I think it is preliminary.

Miss Kelley: I question the materiality of it, Mr. Examiner.

Exam. Baumgartner: How do we know it is material until we find out what this is all about? He has asked some preliminary questions.

Miss Kelley: The question should be pointed, Mr. Examiner, to limit him.

Exam. Baumgartner: He is asking some preliminary question; I think he is entitled to do it. Miss Reporter, will you please read the question.

(Question read as follows: "Will you tell us when and where the incident occurred.")

The Witness: On November 10, 1954 on Route 83 in Somers, Connecticut.

By Mr. Mueller:

Q. And what happened on Route 83?

[fol. 863] A. We came across an L. Nelson—

Q. By "we," whom do you mean?

A. LaCour and I.

Q. Were you in a government car?

A. We were. We came across an L. Nelson & Sons tractor semi-trailer which was leased to the Gilbertville Trucking Company. The vehicle was stopped at the side of the road.

Exam. Baumgartner: What was that, a tractor and trailer?

The Witness: Tractor semi-trailer unit.

By Mr. Mueller:

Q. And did you inspect the vehicle and hold a conversation with the driver at that time?

A. We did.

Q. And did you make out a form that is prescribed by the Interstate Commerce Commission for the use of its safety inspectors for such purpose?

A. I prepared an SS-31 vehicle inspection report, yes.

Q. And have you had cause to be prepared certain copies of that Form SS-31 report?

A. Yes, I made photostatic copies of the report myself.

Mr. Mueller: Mr. Examiner, I shall ask that this paper which I have handed to Mr. Shea be marked as an exhibit for identification purposes.

Exam. Baumgartner: This document has a heading, "Interstate Commerce Commission, Bureau of Motor Carriers, Driver-Equipment Compliance Check," dated [fol. 864] 11/10/54, which instrument will be marked as Exhibit No. 27 for identification, Witness Shea.

(Government's Exhibit No. 27, Witness Edward Shea, was marked for identification.)

By Mr. Mueller:

Q. Mr. Shea, is the written portion of this Exhibit No. 27 in your own handwriting?

A. It is.

Q. And will you further describe the exhibit, please.

A. This is an inspection report prepared on a vehicle leased to Gilbertville Trucking Co., Gilbertville, Mass., and the unit consisted of an International tractor, Company No. 97, Connecticut Registration F5965; the semitrailer was a Fruehauf semitrailer, Rhode Island Registration 4226, Carrier Company No. T82. The vehicle had paper placards attached to both doors of the tractor.

Exam. Baumgartner: Tell us, as you go along, where those items appear on this.

The Witness: The item about paper signs on the tractor is written lengthwise along here. It says, "Paper signs on tractor."

Exam. Baumgartner: Over to the left.

The Witness: On the left-hand side, written lengthwise of the paper, it says, "Paper signs on truck."

Exam. Baumgartner: Now I see some inscriptions above that on the left.

[fol. 865] The Witness: It says, "All D.P.U. plates Rhode Island, Massachusetts, Connecticut are L. Nelson," and then I listed D.P.U. plates Connecticut 7689, Massachusetts 23834, Rhode Island 5712. Those are all L. Nelson D.P.U. plates from the tractor.

Exam. Baumgartner: What does D.P.U. mean?

The Witness: Department of Public Utilities. An item on the opposite side says that the vehicle was owned by L. Nelson & Sons Co.

Exam. Baumgartner: You mean on the opposite margin?

The Witness: "Owned by L. Nelson & Sons Co., lease on vehicle."

Exam. Baumgartner: What do you mean by lease on vehicle?

The Witness: That the driver had a copy of the lease with him, and there is a note, "Bills 9667 N, 9685 N and 624, numbers of the bills for shipment he had on the truck."

Exam. Baumgartner: He had only three shipments on the truck?

The Witness: That is all it shows here. The driver's name was R. Claremont. It says, "Hours of service, Driver's log R. Claremont," and says he had no log that day, "None today." His doctor's certificate was O. K.

Exam. Baumgartner: What was that?

The Witness: Doctor's certificate O.K., he had it with him. Under "Remarks, miscellaneous freight, Rockville, [fel. 866] Conn. to Pittsfield, Mass.; Route followed, 83 to U.S. 5 to Holyoke, Route 9 to Pittsfield, Mass." Signed by the driver Claremont and signed by me.

Exam. Baumgartner: Do you want to carry it any further.

Mr. Mueller: I am going to question him further about the incident.

Exam. Baumgartner: Well, are you going to question him any more concerning the contents of this document at this time or not?

Mr. Mueller: I will later, Mr. Examiner.

Exam. Baumgartner: All right.

By Mr. Mueller:

Q. Now, Mr. Shea: at the time that you made up the Driver-Equipment Compliance Check, Exhibit No. 27, did you inspect the lading on the vehicle?

A. No, I did not.

Q. Did you examine the bills which you have enumerated?

A. Yes, I did; I took the numbers from them.

Q. And from that inspection, can you now tell us anything about the origin and destination of the freight that was on the vehicle?

A. Other than it was moving on this vehicle from Rockville, Conn. to Pittsfield, Mass., I can't tell you.

Q. Whose pros were these?

A. I can't answer that.

Exam. Baumgartner: By that, you mean which company [fol. 867] issued them, I presume.

By Mr. Mueller:

Q. You said there was a lease on the vehicle.

A. There was; the driver had a copy of the lease with him.

Q. Can you now tell us as to the interchange points specified on that lease or what point the equipment was taken over by Gilbertville Trucking?

Miss Kelley: I object to the question. It doesn't appear he has a copy of the lease.

Exam. Baumgartner: Well, he inspected it and if you want to test his memory about it on cross examination, you may do so.

The Witness: Interchange point shown was Monson, Mass.

Exam. Baumgartner: What do you mean?

The Witness: Interchange, where the interchange between L. Nelson and Gilbertville was effected was at Monson, Mass., according to the lease.

Exam. Baumgartner: Now you mean that was the point at which the vehicle came under lease to Gilbertville?

The Witness: Yes.

By Mr. Mueller:

Q. What about the interchange point as to the shipments, Mr. Shea; what did the pros show as to the interline of shipments?

Miss Kelley: I object to the question.

Exam. Baumgartner: Why do you object, Miss Kelley?

[fol. 868] Miss Kelley: Mr. Shea has already said he knows nothing about these pros outside of the numbers that he took off.

Exam. Baumgartner: Well, he can say again he doesn't know.

The Witness: I don't know.

By Mr. Mueller:

Q. Well, Mr. Shea, what was the point of origin of the lease for Gilbertville?

Exam. Baumgartner: What did the lease show with respect to when the vehicle came subject to the lease, at what point?

The Witness: Papers that the driver had with him showed that he was supposed to go through Monson, Mass.

Exam. Baumgartner: Well, what papers?

The Witness: As I recall, it was the lease.

Exam. Baumgartner: Well, do you mean that that is the point at which the lease with respect to that vehicle became effective?

The Witness: As I recall it.

By Mr. Mueller:

Q. Well, now, can you describe North Somers, Connecticut in respect to its geographic location, Mr. Shea?

A. I can.

Q. What is it?

A. It is about 30 miles north of Ellington of the L. Nelson terminal and it is right on the Massachusetts-Connecticut line. It is just south of the Massachusetts-Connecticut line.

[fol. 869] Q. How far would it be from Monson, Mass.?

A. I would say about 15 miles.

Q. In which direction did you observe this vehicle to be proceeding, Mr. Shea?

A. It was going north. When we saw the vehicle, it was stopped; it was facing north.

Q. Did you in any way ascertain between what points that vehicle was operating in the transportation of the

shipments which you have enumerated as being covered by these bills?

A. Yes, I did.

Q. Tell us what you ascertained.

A. I ascertained that the vehicle was moving on Route 83 to U.S. 5, north on U.S. 5 to Holyoke, then west on Route 9 to Pittsfield, Mass.

Q. And where would that route be with respect to Monson, Mass.?

A. It did not go through Monson, Mass.

Q. Now, Mr. Shea, after this observation of this vehicle, did you and Mr. LaCour return to Ellington?

A. We did.

Q. Did you, on that day, talk with any drivers?

A. We did.

Miss Kelley: What date was this?

Exam. Baumgartner: November 10, 1954.

By Mr. Mueller:

Q. Did you interview a driver named Lambert?
[fol. 870] A. Lambert?

Q. Lavallee?

A. Driver Lavallee, yes.

Exam. Baumgartner: But not Lambert?

The Witness: Yes, I talked with a driver Lambert.

By Mr. Mueller:

Q. Now, directing your attention first to driver Lambert, did you observe him in and about a motor vehicle?

A. Yes, he was loading a vehicle at the Ellington terminal of L. Nelson.

Q. Was that vehicle placarded in any way?

A. Yes, it carried paper placards showing that it was leased to the Gilbertville Trucking Company.

Q. Under these paper placards were there some instructions indicating that it was owned by some one else?

A. It was owned by L. Nelson & Sons.

Q. Did you discuss with driver Lambert his daily operations?

A. He said his daily—

Miss Kelley: I object; that calls for a yes or no answer.

Exam. Baumgartner: Yes, that is right.

The Witness: I did.

By Mr. Mueller:

Q. What did he tell you?

Miss Kelley: I object, being hearsay.

Exam. Baumgartner: Sustained.

By Mr. Mueller:

Q. Did you inspect the vehicle that Mr. Lambert was [fol. 871] driving on that day?

A. I did.

Q. And did you examine the load?

A. I did.

Q. And could you tell us from this inspection anything about the origin and destination of his trip?

A. The inspection of his load and documents he carried indicated that he was going to Danbury, Conn. and return to Rockville, Conn.

Q. Now where is Danbury, Mr. Shea, in respect to Rockville?

A. I should say it is about a hundred miles west of Rockville. It is well over towards the New York line, as I recall it.

Q. Now you have mentioned driver Lavallee.

A. Yes.

Q. Did you also examine the vehicle that he was working on or in or about?

A. He had a straight truck which had no placards on it; it was owned by Gilbertville Trucking Company and inspection of the load and documents indicated that he was going to Hartford, New Haven and Bridgeport, Connecticut.

Q. And where would those points be in respect to Rockville?

A. Hartford is about 17 miles west of Rockville and New Haven is then about 50 miles south of Hartford and Bridgeport is 30 miles west of New Haven, approximately.

[fol. 879] Direct examination (continued)

By Mr. Mueller:

Q. Mr. Shea, in conclusion of yesterday's testimony, we were engaged in questioning you concerning a visit to the Ellington, Conn. terminal of the Gilbertville Trucking Company and L. Nelson & Sons Transportation Company on November 10, 1954, if I remember correctly. I would like to inquire whether, in the course of that second visit on November 10, 1954, you inspected additional Gilbertville [fol. 880] records. Will you please answer yes or no.

A. Yes.

Q. Specifically, did you examine drivers' logs?

A. No.

Q. Why not?

Miss Kelley: I object.

The Witness: They were not—

Exam Baumgartner: I think the witness may answer. I can't see a basis for the objection.

Miss Kelley: Well, his mental process is not evidence, Mr. Examiner. He did not examine drivers' logs.

Exam. Baumgartner: Well, it might not involve only mental processes. It may involve some other matters. You may answer, Mr. Shea.

The Witness: We did not inspect any Gilbertville Trucking Company drivers' logs.

By Mr. Mueller:

Q. And why not?

A. There were none available for our inspection.

Q. Did you make a demand for the production of Gilbertville drivers' logs on that day?

A. Yes.

Q. Of whom did you make that demand?

A. Mr. Kenneth Nelson.

Q. Did he make any response to that demand?

Miss Kelley: I object, hearsay.

[fol. 881] The Witness: Yes.

Exam. Baumgartner: You inquired of whom?

The Witness: Kenneth Nelson.

Exam. Baumgartner: And this was at L. Nelson & Sons office.

The Witness: In his office, upstairs in the Nelson building.

Exam. Baumgartner: Did you ask for Nelson drivers' logs?

The Witness: No, I asked Kenneth to produce Gilbertville Trucking Company drivers' logs.

Exam. Baumgartner: Well, you made a demand of him then and there.

The Witness: That is right.

Exam. Baumgartner: All right, you may answer.

The Witness: He said they were at the Gilbertville Trucking Company terminal at Gilbertville.

[fol. 882] By Mr. Mueller:

Q. Now, Mr. Shea, did you examine the Gilbertville time cards on that day, November 10, 1954?

A. I did.

Q. And I will ask you whether or not any of those cards showed driving of over 12 hours.

A. They did.

Q. You are, of course, acquainted with the Commission's rules requiring the preparation of drivers' logs.

A. I am.

Q. Just for the record here, I will ask you whether or not the rules require the preparation of a driver's log for trips over 12 hours, even though a trip may be less than 50 miles in length?

A. That is correct.

Exam. Baumgartner: What does this card show, driving time of over 12 hours?

The Witness: No, the cards would show total daily on-duty time, and the rule is the driver cannot be on duty more [fol. 883] than 12 hours a day.

By Mr. Mueller:

Q. That day, namely, November 10, 1955, did you see a list posted anywhere in the Nelson offices of Nelson drivers?

A. Yes, I did.

Q. And in connection with your examination of Gilbertville records on that day, did you discover the names of any of these Nelson drivers in the Gilbertville records?

A. Yes, I did.

Exam. Baumgartner: That was on the posted list?

The Witness: A seniority list in the drivers' room of L. Nelson & Sons drivers.

Exam. Baumgartner: What did you say—

The Witness: On that list were some of the Gilbertville drivers.

By Mr. Mueller:

Q. You say some of them, can you say how many?

A. Five or six.

Q. Did you discuss the purchase of motor vehicle equipment with Kenneth Nelson on Wednesday, November 10, 1954?

A. I did.

[fol. 887] Q. The question is whether you asked Mr. Nelson concerning the purchase of any vehicles from L. Nelson & Sons Transportation Company for Gilbertville Trucking Company.

A. I did.

Q. And what did he say?

Miss Kelley: My objection is running, of course.

Exam. Baumgartner: Oh, yes, that is understood, Miss Kelley.

The Witness: He said that he had purchased six vehicles, four tractors and two straight trucks and that he still owed L. Nelson for two tractors.

By Mr. Mueller:

Q. By "he," you mean as a representative of Gilbertville?

A. That is right.

Q. Now, Mr. Shea, did you discuss equipment repairs with Mr. Kenneth Nelson on that day; just please answer yes or no?

A. Yes.

Q. And I will ask you whether you have heard the testimony of Mr. Kenneth Nelson in this proceeding and whether [fol. 888] or not what he told you on November 10, 1954 was consistent with his testimony in this proceeding.

Exam. Baumgartner: Well, now, Mr. Mueller, I don't think it is up to this witness to determine the consistency or inconsistency of the two statements. I think what that witness should do is testify what statements were made at the time he talked to Mr. Kenneth Nelson.

Mr. Mueller: Thank you, Mr. Examiner, I was merely trying to shorten up this examination.

Exam. Baumgartner: I know, but it isn't for him to determine whether the statements were consistent or inconsistent; that is for the Commission.

By Mr. Mueller:

Q. Mr. Shea, on November 10, 1954, what did Mr. Kenneth Nelson tell you with respect to the repairs to Gilbertville equipment?

Miss Kelley: Objection, being hearsay.

Exam. Baumgartner: On the same basis as the prior objection?

Miss Kelley: Yes, sir.

Exam. Baumgartner: The witness may answer subject to your objection.

The Witness: Mr. Kenneth Nelson said that all repairs to Gilbertville vehicles were made in L. Nelson shops at Rockville, Conn.

By Mr. Mueller:

Q. Did he tell you about the basis for the billing?
[fol. 889] A. The Gilbertville Company was to be billed for repairs at actual cost of parts and labor, plus 10 per cent profit.

Q. On the occasion of your visit to the Gilbertville terminal, to which you have previously testified, did you observe the existence of any repair shops?

A. There were none at Ware, Mass.

Q. Now, Mr. Shea, after your visit of November 10, 1954 to Rockville, did you return to your headquarters?

A. I did.

Q. And subsequently, on November 12, 1954, did you make a further investigation?

A. I did.

Q. Where?

A. On November 12, 1954, about 8:10 a.m., I visited the Newton terminal of the L. Nelson & Sons Transportation Co.

Q. Did you talk with any individuals there?

A. I talked with Mr. Kenneth Call, day foreman, and a Larry McCue, night dispatcher.

Q. Did you examine any manifests or records on that day?

A. I did.

[fol. 898] By Mr. Mueller:

Q. Now, Mr. Shea, can we go back for a moment to the occasion of your visit to the Ware terminal of Gilbertville, which, I believe, you said was October 22, 1954. Did you talk to Mr. Kashady on that day, just answer yes or no?

A. Yes.

Q. Did you make a request for permission to examine the stock record book of Gilbertville Trucking Company on that day?

A. I did.

Q. Was it produced for your inspection?

A. It was not.

Q. Did you ask leave to examine the accounting records?

A. I did.

Q Accounts receivable, things of that kind.

A. I did.

Q. Were you granted that permission?

A. Those records were not available for my inspection.

Exam. Baumgartner: What do you mean by that, they were not available? Do you mean they were not made available?

The Witness: I was told they were not available for my inspection by Mr. Kashady.

Exam. Baumgartner: Were you told why they were not available for your inspection?

The Witness: Yes, I was.

[fol. 899] Exam. Baumgartner: What was the reason?

The Witness: Because they were in L. Nelson's terminal at Rockville, Conn.

Exam. Baumgartner: Who told you that?

The Witness: Kashady.

Exam. Baumgartner: At that time?

The Witness: Right that day, yes.

By Mr. Mueller:

Q. Now on the occasion of your subsequent visit to Ellington, Conn. on November 9 and 10, 1954, did you ask permission of any one to inspect the stock record books of Gilbertville Trucking Company?

A. I did.

Q. And what was the result of that request?

A. I did not see the stock record books or the minutes of the stockholders' meetings either.

Q. Were you told where they were?

A. Yes.

Q. Please state what you were told.

A. Mr. Kenneth Nelson told me—

Miss Kelley: I object as hearsay.

Exam. Baumgartner: Well, this is the same pattern as the discussion we had before, the response made to an official request by an officer in the performance of his duty. You may answer.

The Witness: Mr. Kenneth Nelson told me they were in [fol. 900]. Mr. Parashinsky's office, his attorney, in Springfield, Mass.

By Mr. Mueller:

Q. Did Mr. Kenneth Nelson tell you or did you ascertain what his position was in the corporation?

A. He told me he was president.

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[fol. 901] By Mr. Mueller:

Q. Now, Mr. Shea, do you recall inspecting a vehicle of L Nelson & Sons on May 12, 1955 at a point in Rhode Island?

A. I do.

Q. And as you inspected that vehicle, did you make some notes on a form provided by the Interstate Commerce Commission?

A. I prepared an SS-31 report.

Q. And did you have copies of that report prepared for submission here?

A. Yes, I made photostatic copies of the report.

Mr. Mueller: Mr. Examiner. I respectfully request that the report referred to be marked for identification.

Exam. Baumgartner: The report just referred to, Driver-Equipment Compliance Check, dated May 12, 1955, will be marked Exhibit No. 29 for identification, Witness Shea.

(Government's Exhibit No. 29, Witness Edward Shea, was marked for identification.)

By Mr. Mueller:

Q. Now, Mr. Shea, referring to Exhibit No. 29, and refreshing your recollection therefrom, will you tell us the name of the carrier whose vehicle was inspected?

A. L Nelson & Sons Company, Rockville, Conn.

Q. And did that vehicle appear to be marked as the equipment of L Nelson & Sons Transportation Company?

A. It was owned by L Nelson & Sons Company.

Exam. Baumgartner: Just a minute, how do you know it [fol. 902] was owned by Nelson?

The Witness: By the name and the registration certificate the driver carried. The name was displayed on the side of the tractor and the registration certificate.

Exam. Baumgartner: L Nelson & Sons was shown as the owner?

The Witness: That is right, registered in their name.

By Mr. Mueller:

Q. And does this Exhibit No. 29 contain a description of the vehicle in question?

A. It does.

Q. By the way, where did this inspection occur, Mr. Shea?

A. During a road trip on Route 146 at North Smithfield, Rhode Island, which is near the Massachusetts-Rhode Island state line.

Q. Were you accompanied by other people in that trip?

A. There were other Commission employees there and Rhode Island State Police, Rhode Island D.P.U. Inspector and Inspector for the Registry of Motor Vehicles.

Q. Can you enlighten the Examiner a little bit about the procedure in making checks such as you are now describing?

A. Yes. These road checks are surprise checks run periodically by the Commission's employees to inspect vehicles moving in interstate commerce to determine if they are complying with the safety regulations and other regulations of the Commission.

Q. And you are assisted in these procedures by State personnel, police officers and so on.

A. They are there to stop the vehicles. Usually we proceed to inspect the vehicles.

Exam. Baumgartner: Again you are getting over into this field which is the basis for the motion, and I would prefer that that be deferred until we specifically take up the matters to be considered in furtherance of the motion.

By Mr. Mueller:

Q. Along the left-hand margin, I notice certain items such as brakes, the lighting devices and reflectors. Do you

care to tell us about some notations in respect to those two items?

A. Item under reflector indicates the right rear was broken.

Exam. Baumgartner: Where is that indicated?

The Witness: That is about half way down the form.

By Mr. Mueller:

Q. And over in the right-hand margin, opposite the remark you just made, appears something else.

A. Doctor's certificate O.K., which indicates that the driver had a doctor's certificate with him in good order.

Q. By the way, Mr. Shea, these entries you are referring to are in your own handwriting.

A. This is my own handwriting, yes.

Q. And they were made at the time of this inspection.

A. While I was inspecting the vehicle.

Q. And now in the next box there is an item Parts and Accessories, do you care to note any comment there?

A. Yes, I made a note that the rocker bearing on the bed plate on the tractor was loose and should be tightened.

[fol. 904] Exam. Baumgartner: Now will you please tell us what all these check marks mean.

The Witness: The check marks indicate that the items were inspected and found in good operating condition.

Exam. Baumgartner: Now is that true of this report that was submitted for identification as Exhibit-27 yesterday?

The Witness: Yes. The check marks indicate items that were checked and found in satisfactory compliance.

By Mr. Mueller:

Q. Now in the next box, Emergency Equipment, I note a number of check marks and then there is a comment over on the right-hand corner.

A. Under the item Spare light bulbs, I made an entry, no seal beam unit.

Q. What does that mean?

A. That the vehicle was not equipped with a spare headlight unit to be used in case one of the headlights burned out.

Q. Who was the driver of this equipment; did you note his name?

A. The driver gave the name of V. J. Shewokis.

Q. And I note a comment there on the subject of logs.

A. His log was in good condition.

Q. Now down in the box headed Remarks at the foot of the exhibit, there are certain notations. Will you tell us what they signify.

A. On inspecting the load on the vehicle, the driver [fol. 905] showed me three pros covering shipments of spools. These were L Nelson & Sons pros, P22202, P22178 and P22081.

Q. Did you examine the load?

A. I checked the load against these papers the driver carried.

Q. Did you find those items covered by those pros on the vehicle?

A. I did.

Exam. Baumgartner: Now just at that point, what kind of spools were those?

The Witness: I don't know, I didn't open the boxes. I don't know whether it is spools there or not.

By Mr. Mueller:

Q. Now in addition to the items covered by the pros just mentioned, Mr. Shea, did you discover any other shipment on the vehicle?

A. Yes, near the tailgate I found a box for which there were no papers on the vehicle when I questioned the driver.

Q. And do your notes under the heading of Remarks refer to that item?

A. Yes. I later found in the driver's compartment a Gilbertville pro.

Q. Just a minute, Mr. Shea, did you ask the driver for permission to examine a bill of lading or other shipping paper covering that box that you have just referred to?

A. I did.

Q. With what result?

[fol. 906] A. Said he didn't have any.

Q. Did you later find a pro or bill of lading covering that shipment in or about the vehicle?

A. I did.

Q. Will you tell us about it?

A. Well, inspecting the cab of the vehicle looking for fire extinguishers, fuses, flares and flags, I noticed in an open bag on the floor of the compartment a Gilbertville pro which I picked up and found it covered the shipment out near the tailgate of the truck, and that pro was a Gilbertville pro R16869, covering a shipment of one case of machine rolls from the Elmvale Dye Works, Pittsfield, Mass. to the M. W. Bonn Roller Works, Fishville, Mass.

Exam. Baumgartner: What was that you say, a case of machine rolls?

The Witness: That is right.

Exam. Baumgartner: Do you know what kind of machinery?

The Witness: No, I do not.

Exam. Baumgartner: You don't know whether it is textile machinery or what?

The Witness: No, I do not know.

By Mr. Mueller:

Q. The remarks you have just made, I take it, were taken from the manner in which the shipment was described on the bill of lading.

A. I copied it right off the pro, the description on the pro.
[fol. 907] Miss Kelley: It is noted that was an intrastate shipment.

By Mr. Mueller:

Q. Where did you inspect this vehicle, Mr. Shea?

A. In Rhode Island, North Smithfield, Rhode Island.

Q. I notice two signatures at the bottom of Exhibit 29, Mr. Shea.

A. That is driver Shewokis' signature and my signature on the bottom of the report.

Exam. Baumgartner: Why did Shewokis sign this?

The Witness: We gave him a copy of this. He signs for receipt of the copy received by him. He gets the pink copy.

Miss Kelley: Mr. Examiner, at this point, can we ask Mr. Shea what was the weight of the box that he was referring to?

Mr. Mueller: Mr. Examiner, I submit that is a proper subject of cross examination.

Exam. Baumgartner: Well, if you have got it there, give it to us now, Mr. Shea.

The Witness: It was not so indicated on the bill and I didn't get it.

By Mr. Mueller:

Q. Now, Mr. Shea, do you recall visiting the Newton terminal of L Nelson & Sons on or about November 8, 1955?

A. I do.

Q. Did you meet with any personnel there?

[fol. 908] A. I did.

Miss Kelley: I object. Isn't this repetition, Mr. Mueller? I think you went into this before.

Exam. Baumgartner: This is a year later, Miss Kelley, as I understand it, this is November '55 now. The prior one was November '54.

Mr. Mueller: Prior testimony related to November 12, 1954 insofar as the Newton terminal was concerned. We are now addressing ourselves to November 8, 1955.

By Mr. Mueller:

Q. Did you find Clifford Nelson there?

A. Yes.

Q. Did you find a Kenneth Call there?

A. Yes.

Q. And was there a driver there?

A. Yes, there were several drivers there.

Q. How about a Mr. McCue?

A. I saw a Mr. McCue there.

Q. How about a Mr. William Smith?

A. Yes.

Q. Did you ascertain his title?

A. Assistant terminal manager for L Nelson & Sons.

Q. Did you observe any motor equipment at the premises at Newton, Mass. on that day?

A. When I first arrived there, I observed a Gilbertville tractor semitrailer standing loaded in the yard.

[fol. 909] Q. That tractor and trailer bore the name of Gilbertville, did it, in permanent fashion?

A. No.

Q. With the name and number painted on the side.

A. The combination consisted of an L Nelson & Sons International tractor No. 66 and a stripped semitrailer Gilbertville truck WT111.

Q. Now, leaving the equipment for the moment, Mr. Shea, did you observe Mr. Clifford Nelson in the act of employing a driver on that day?

Miss Kelley: I object to that question. It definitely is leading.

Exam. Baumgartner: I guess it is a little leading all right, Mr. Mueller.

By Mr. Mueller:

Q. Well, did you observe the activities of Mr. Clifford Nelson on that day?

A. I did.

Q. Were you a witness to the employment of a driver?

Miss Kelley: I object; it is a leading question.

Exam. Baumgartner: Just ask him what he observed.

By Mr. Mueller:

Q. All right, Mr. Shea, tell us what you saw and heard.

A. I saw Mr. Clifford Nelson hire a driver, Herbert Erb, of 34 Putnam Street, Somerville, Mass.

[fol. 911]

By Mr. Mueller:

Q. Did you observe the driver Herbert Erb on the vehicle you have described after he was hired?

A. I did.

Q. Now you have stated that the tractor—

Exam. Baumgartner: Just a minute, don't you want to pursue that a little bit further? His merely being on the vehicle doesn't mean much.

By Mr. Mueller:

Q. Under what circumstances and when and where did you observe him?

Exam. Baumgartner: What was he doing on the vehicle, if anything?

The Witness: I observed this man come in and found out later his name was Herbert Erb. I saw him answer questions put to him by—

Exam. Baumgartner: No, listen, Mr. Shea; we are trying to find out what you saw that man doing on that vehicle.

The Witness: He drove it out of the yard.

Exam. Baumgartner: That is what we want to know.

By Mr. Mueller:

Q. When was that, Mr. Shea?

A. Later on the same morning.

Q. Now before that was done, before that vehicle left the [fol. 912] yard, were any placards affixed to the tractor?

A. Yes. Just before it left, they suddenly affixed a Gilbertville Trucking Company placard on each side of the tractor and a lease for the unit was prepared in my presence from Nelson to Gilbertville. That was prepared while I was watching them.

Q. Who signed the lease?

A. Mr. Call signed it for Gilbertville Trucking Company and Clifford Nelson signed the lease for L. Nelson & Sons.

Q. Now did you inspect the lading of that vehicle?

A. Yes, I did.

Q. Did you see any one hand any freight bills to the driver?

A. Yes.

Q. And did you have an opportunity to see those freight bills?

A. Yes.

Q. And after you saw them, what, if anything, did you do?

A. I checked the bills against the shipments on the truck

and I found that there was a shipment of 14 bales of silk on this truck for which the driver had no papers.

Q. Did you call your observation to the attention of any one there?

A. I called it to the attention of Mr. Clifford Nelson.

Q. What, if anything, did he do?

A. He telephoned New York.

Q. And after that telephone call was made, what else [fol. 913] did you observe?

A. Upon receipt of the information by telephone from New York they prepared a Gilbertville pro or freight bill No. 3485 covering this shipment.

Q. Now referring again to the freight bills that you previously mentioned, were those Gilbertville freight bills or L. Nelson freight bills, if you recall?

Miss Kelley: I object to the leading questions.

Exam. Baumgartner: Well, I think you have been pretty leading, in part at least.

Mr. Mueller: I will try to restrain myself, Mr. Examiner. I am trying to get on with this.

Exam. Baumgartner: Yes, I realize that.

Miss Kelley: I objected to the question. I understood you sustained my objection on the grounds it was leading.

Exam. Baumgartner: Yes, I told him it was rather leading. Rephrase the question, Mr. Mueller.

By Mr. Mueller:

Q. In whose name were the pros prepared which you first examined?

A. I don't recall.

Q. Did you inquire as to the matter of a medical certificate for the driver Erb?

A. I did.

Exam. Baumgartner: You mean doctor's certificate?

The Witness: Yes.

[fol. 914] By Mr. Mueller:

Q. Was there a doctor's certificate for this man?

A. There was not.

Q. Did you call that omission to the attention of any one there?

A. Yes, Clifford Nelson.

Q. But the driver, nevertheless, left on a trip.

A. I saw him drive out of the yard.

Q. Now on this day, Mr. Shea, namely November 8, 1955, did you have occasion to examine manifests prepared by or for L. Nelson & Sons Company and Gilbertville Trucking Company at the premises at Newton?

A. I did.

Q. Have you any comment as to the form which those documents took?

A. The manifests were identical that were used by the two companies with the exception that the Gilbertville Trucking Company manifest had the name of L. Nelson at the top scratched out and a Gilbertville Trucking Company name typed in on the manifest.

Q. Was there anything else that you observed with respect to the manifest which you inspected?

A. Yes. The manifests for the L. Nelson & Sons' loads were very complete, giving all the information, including the number of the trailer on which the load would leave [fol. 915] Newton and the trailer number would show also. However, on the manifests of Gilbertville, they were very sketchy and no information as to the trailer number on which it left the terminal.

Q. While you were there, Mr. Shea, did you ask leave to examine drivers' logs?

A. Yes, I did.

Q. Did you examine any?

A. No.

Q. Why not?

A. Because there were none kept at this terminal.

Q. What about doctors' certificates, did you examine any of those?

A. Relative to Gilbertville Trucking Company, there were no logs, no doctors' certificates, no bills of lading, no statements, no interline receipts there for my inspection.

Q. Now, Mr. Shea, on the occasion of your previous visit to the terminal at Newton in 1954, did you observe a teletype machine?

A. I did.

Q. Now on November 8, 1955, did you observe a teletype machine at that terminal?

A. I did not.

Q. Now did you observe any other vehicles on the day in question?

A. Yes, I did.

[fol. 916] Exam. Baumgartner: Just a minute, which day in question, '54 or '55?

By Mr. Mueller:

Q. November 8, 1955.

A. Yes, I did.

Q. Can you now identify the vehicle that you observed?

A. Yes. Around noon time I observed an L. Nelson & Sons truck and semitrailer pull into the yard. This combination was an L. Nelson tractor 114 and an L. Nelson trailer T83.

Q. Did you ask permission to see the driver's log book?

A. Yes.

Q. With what result?

A. The driver had no log book with him.

Q. What, if anything, did you observe with respect to shipping papers?

A. Before I got a chance to look at the shipping papers, Mr. Clifford Nelson took the papers and went in the office of the building while I was talking with the driver.

Q. Did you subsequently ask Mr. Nelson for permission to inspect those shipping papers?

A. I did.

Q. And with what result?

A. He showed me two pros, M4125 and P25777.

Q. Can you tell us what those covered?

A. Those are L. Nelson pros, one 25777 covered a shipment of 20 bales of thread waste from Philadelphia Dye [fol. 917] Works, Philadelphia, Pennsylvania to United Waste Company, East Dedham, Mass.

Q. Did you observe that shipment on the vehicle?

A. I did.

Q. Now what did pro 4125 cover?

A. That was a shipment of 5 bales of rags from the Glaser-Jaffee Wool Stock, Inc., New York, N. Y. to Horte

Dupree & Sawyer, care of Joseph Neubentler Company of Methuen, Mass.

Q. When you inspected pro No. M4125, did you observe some penciled notations on it?

A. I noticed a penciled notation stating "five cartons unfinished pieces" had been written in under the other shipment.

Q. Did you observe a shipment meeting that description on the vehicle?

A. There were 5 cartons on the load without any shipping papers.

Q. Did you make any inquiry concerning who made the penciled notation on pro M4125 that you have just referred to, answer yes or no?

A. I did.

Q. Of whom did you inquire?

A. Driver Nusuata.

Q. What did you ask him?

A. If he had written that penciled notation on the pro.

Q. What was his answer?

Miss Kelley: I object.

[fol. 918] The Witness: No.

Exam. Baumgartner: Still want to object?

Miss Kelley: Might as well be consistent.

Exam. Baumgartner: The answer is no.

By Mr. Mueller:

Q. Did you also inquire of Mr. Clifford Nelson?

A. I asked Clifford Nelson if he wrote it.

Q. What was his answer?

[fol. 920] The Witness: Clifford Nelson's answer was, "I don't think I have to answer that."

By Mr. Mueller:

Q. Did you make any further efforts to find out something about the origin and destination of that shipment?

A. I did.

Q. What did you do and what occurred?

A. A little while later I was checking manifests and I

discovered a piece of yellow letter paper about 8 by 10½ inches, which was written at the top in pencil, "Driver L Nusuata, tractor 114, trailer T83," and below that was written a description of the shipments moving on pro M4125 and P25777. There were three other items listed on this yellow sheet, which apparently covered the 5 cartons for which I had no papers.

Q. Now what happened with respect to that yellow paper, Mr. Shea?

A. I finally determined that this yellow sheet was written in Mr. Smith's handwriting but he was not present at that time. He had left the terminal.

Q. Did you show the yellow paper to any one?

[fol. 921] A. I then showed the yellow sheet to Clifford Nelson.

Q. And did he take it from you?

A. He took it and walked away with it.

Q. Did you later ask him for it?

A. I did.

Q. With what result?

A. He said he had already—

Miss Kelley: I object.

Mr. Mueller: He can certainly say what was done.

Exam. Baumgartner: Go ahead and say what happened then.

Miss Kelley: Here he is asking for conversation.

Mr. Mueller: I am not, Mr. Examiner.

(Question read.)

Mr. Mueller: May we have the answer, Mr. Examiner?

Exam. Baumgartner: You may answer, subject to Miss Kelley's objection.

The Witness: He said he had already returned it to me.

By Mr. Mueller:

Q. What did you say then?

A. I told him he had not returned it to me and I asked him again to show it to me.

Q. Did you get it?

A. I never was able to lay my hands on that document again.

Q. Did you watch the unloading of that trailer, Mr. Shea?

A. No, I didn't.

Q. What happened?

[fol. 922] A. I waited until after 6 o'clock and they didn't unload the trailer so I left.

Q. Did you return the next day?

A. I did.

Q. And were you able to see the cartons in question?

A. Yes, the next morning at 6:30 a.m. I found two of those cartons on the platform.

Q. What else did you observe?

A. There were no papers available for these two cartons. One was marked consigned to, Horeman & Gumman, 75 Kneeland Street, Boston, Mass. It was also marked via Gilbertville Trucking Company. Name of the consignee on the second one was Theodore Kaplan, 124 Kneeland Street, Boston, Mass.

Q. Did you endeavor to ascertain who the shipper was?

A. I did.

Q. With what result?

A. I could not get the information.

Q. Did you know what was in the cartons, Mr. Shea?

Miss Kelley: I object to the question.

The Witness: I do not know what was in the cartons.

Exam. Baumgartner: He is just simply asking if he knew something.

(Discussion off the record.)

By Mr. Mueller:

Q. Now, Mr. Shea, I will direct your attention to another date, namely May 2, 1956. I will ask you whether on that [fol. 923] day you were engaged in making certain road checks.

A. I was.

Q. And was Mr. LaCour with you?

A. He was.

Q. At that time?

A. He was.

Q. Were other members of the Commission staff there?

A. Yes.

Q. And where did this road check occur?

A. On Route 15 in Union, Connecticut, at the scale house, the State Police weighing station.

Q. And were certain State Department of Public Utilities officials and State Police present?

A. There were State Police officers there, there was an Inspector from the Connecticut Department of Public Utilities and also an Inspector present from the Department of Motor Vehicles, in addition to the Commission's employees.

Q. And in the course of that road check, did you have occasion to inspect one or more vehicles operated by either of the principals to this proceeding?

A. I did.

Q. And in the course of those inspections, did you prepare Form SS-31 memoranda, of the type heretofore mentioned on this record?

[fol. 924] A. I did, but it should be noted this is a new form. It is a longer form than the other one.

Exam. Baumgartner: It is still known as Form SS-31?

The Witness: Still known as Form SS-31.

Exam. Baumgartner: What is the date of the new form?

The Witness: I think this went into effect in 1955.

Exam. Baumgartner: I mean, underneath the form number, isn't there a date?

The Witness: No, just Form SS-31, 1955; went into effect late in '55.

By Mr. Mueller:

Q. And in connection with the inspection of these vehicles, did you also have occasion, in certain instances, to examine shipping papers in the possession of the drivers?

A. I did.

Q. Will you state whether or not in some instances the drivers had in their possession duplicate copies of such shipping papers.

A. They did.

[fol. 926] Exam. Baumgartner: Did you ask for permission to make copies?

The Witness: Yes.

By Mr. Mueller:

Q. And was it granted?

A. Yes.

Q. By some one?

A. Yes.

Q. Under what circumstances was that done?

Miss Kelley: I object.

Exam. Baumgartner: What is the basis of your objection?

Miss Kelley: You have said, Mr. Examiner, that evidence on my motion will be heard later.

Exam. Baumgartner: Well, I think Miss Kelley is right on that part of it. He has gotten permission, he said, to examine the records. Now let's proceed from there to show what happened, if that is what you are after.

By Mr. Mueller:

Q. Mr. Shea, have you prepared copies of SS-31 forms referred to to be offered as exhibits in this proceeding?

A. I did.

Q. And have you also prepared copies, in certain instances, of certain shipping papers which had relation to the inspection incident covered by the SS-31 form?

[fol. 927] A. I did.

Q. Mr. Shea, I am going to hand you two sheets of paper which we will ask to have marked for identification as Exhibit No. 30.

Exam. Baumgartner: You want both documents to appear as one exhibit?

Mr. Mueller: I thought it would be convenient to do so, Mr. Examiner.

Exam. Baumgartner: One of these documents to which reference is made is a Gilbertville Trucking Co., Inc. Delivery Receipt 67848. The other is a Form SS-31, 1955, entitled Driver-Equipment Compliance Check of the In-

terstate Commerce Commission, dated 5/2/56, and these two documents will be marked Exhibit No. 30 for identification, Witness Shea.

(Government's Exhibit No. 30, Witness Shea, was marked for identification.)

By Mr. Mueller:

Q. Now, Mr. Shea, will you look at the second sheet of Exhibit No. 30, marked for identification, which is Interstate Commerce Commission, Bureau of Motor Carriers, Driver-Equipment Compliance Check, and indicate the name of the carrier, the date, the time and place covered by it.

A. This vehicle tractor semitrailer owned by L Nelson & Sons, Rockville, Connecticut. Inspected May 2, 1956, about 11:20 a.m. on Route 15 in Union, Connecticut.

[fol. 928] Q. And what equipment is covered thereby?

Exam. Baumgartner: I think he stated that, Mr. Mueller. He said tractor and trailer, I think, belonging to L Nelson & Sons.

Mr. Mueller: Yes, but I thought he might further identify it.

The Witness: International tractor, No. 99, and a Gindy semitrailer. No. TO153.

By Mr. Mueller:

Q. And does the exhibit indicate the name of the driver?

A. Driver's name, Martin.

Q. Was there a comment with respect to the driver's log?

A. He had none with him.

Q. What was the comment with respect to a doctor's certificate?

A. He had one dated 1/2/54.

Q. Now, Mr. Shea, skipping over the notations appearing immediately below the box wherein the description of the vehicle appears, to which you have just testified, what does the exhibit show with respect to Brakes?

A. All items are checked as far as brakes are concerned.

Exam. Baumgartner: That means?

The Witness: That the parking brake was all right, the automatic breakaway was all right, and the air-brake warning device was working.

[fol. 929] By Mr. Mueller:

Q. Immediately above the item Brakes, is there something about steering mechanism?

A. Yes, there is a note, "Take up on reach rod;" it was loose. That is right above the item on brakes.

Exam. Baumgartner: What is a reach rod?

The Witness: That is a rod that runs from the bottom end of the drag link connection to the steering connection. Those were loose and should be adjusted.

By Mr. Mueller:

Q. Now, going down to the item Lights and Reflectors, I notice a number of check marks, but opposite the word Battery, there is a comment.

A. Says, "Must be covered." Battery was uncovered. Regulations required the batteries to be kept covered.

Q. Under Parts and Accessories, all items seem to be checked, is that right?

A. No, not all items are checked.

Q. I beg your pardon. The check marks appearing on the exhibit indicate what?

A. That the horn, rear-view mirrors, windshield wipers, speedometer and tires were in working order.

Exam. Baumgartner: What is the failure to put any check?

The Witness: That equipment was not checked. For instance, defrosters, we don't bother with those in the summer time. Heaters we don't bother with. No sleeping berth in the vehicle, no check on that, and no check was made to [fol. 930] the floor of the vehicle, the seal, etc.

By Mr. Mueller:

Q. Now, as to the Emergency Equipment.

A. The fire extinguisher, fuses, flares, flags, spare bulbs, spare fuses and handtools were found in good order.

Q. Now, Mr. Shea, did you examine the contents of this vehicle?

A. Yes, I checked the load against the shipping papers the driver had.

Q. Were there shipments on it of the L. Nelson & Sons Transportation Company?

A. Yes, there were two shipments on L. Nelson's pros on the vehicle, P30174 and P30175. The first one was for 84 bags of wool waste from Philadelphia to Needham, Mass.; the second was for 2 cartons of rayon yarn from Philadelphia, Pennsylvania to Canton, Mass.

Q. Now, did you examine the Nelson's pros covering those shipments at the time?

A. Those two pros, yes.

Q. And they were exhibited to you by the driver.

A. They were.

Q. Now was there a shipment additional to those you have already mentioned on the vehicle?

A. Yes, I found another shipment on the vehicle.

Q. And did you make some notations on your Form SS-31, respecting that additional shipment?

[fol. 931] A. Yes, that there was a shipment moving on Gilbertville Trucking Company pros.

Q. Where on the exhibit does that appear?

A. Down at the bottom under Other Remarks.

Q. Will you proceed.

A. Says, "Also load Gilbertville Trucking Company, Pro R67848, covering a shipment of 3 cartons of fishline from Rockville, Conn. to Boston."

Q. Now I notice a signature at the bottom of this exhibit.

A. Signature of driver Martin and my signature is affixed to the bottom of the report.

Q. Now what is the second part of the exhibit, Mr. Shea, which appears as the first sheet thereof?

Miss Kelley: I object to this, Mr. Examiner.

The Witness: It is a photostat.

Miss Kelley: That question is directed at documents which I allege were illegally taken by the Bureau of Motor Carriers.

Exam. Baumgartner: Yes, well, he will have to answer with respect to that at this point until we come to this por-

tion of the proceeding where you prove that these documents were illegally acquired. It hasn't yet been established that they were illegally acquired, of course. Now, if they were, then, of course, you can object to their admission in evidence and if they are admitted, you can move that they [fol. 932] be stricken, so will you please proceed, Mr. Witness.

The Witness: The second part of the exhibit is a photostatic copy of Gilbertville Trucking Co., Inc. Pro R67848.

By Mr. Mueller:

Q. And what was it covering?

A. That covers a shipment of 3 cartons of fishline weighing 270 pounds. The date is shown as May 1, 1956 and it is marked Prepaid and the consignee was the Boston Camping Distributing Company, 150 Oliver Street, Boston, Mass. The shipper was Kingfisher Bristol Company, Rockville, Conn.

Q. I will ask you, Mr. Shea, whether the number on the upper right-hand corner of this pro corresponds with the number which you noted on your SS-31 form.

A. The number is the same.

Q. Now, Mr. Shea, did you, on May 2, 1956, have occasion to inspect another L. Nelson & Sons Transportation Company vehicle?

A. I did.

Q. At Union, Conn.?

A. I did.

Q. And did you, in the course of your inspection, prepare an SS-31 Form report?

A. I did.

Q. And have you caused copies thereof to be prepared?

A. I made photostatic copies of the report.

Mr. Mueller: Mr. Examiner, I respectfully request that the SS Form 31—

[fol. 933] Exam. Baumgartner: Entitled Driver-Equipment Compliance Check, dated May 2, 1956—

Mr. Mueller:—be marked for identification as Exhibit No. 31.

Exam. Baumgartner: Yes, Witness Shea.

(Government's Exhibit No. 31, Witness Shea, was marked for identification.)

By Mr. Mueller:

Q. Mr. Shea, where did you say the inspection covered by Exhibit 31 took place?

A. Route 15, Union, Conn.

Q. Was that at approximately the time of the inspection covered by Exhibit 30?

A. No, this one was at 10:40 a.m. The other was at 11:20 a.m.

Q. And will you state for the record what vehicle was covered by this examination.

A. This is equipment owned by L. Nelson & Sons Transportation Company, Rockville, Conn., consisting of an International tractor, Co. No. 127 and a Gindy semitrailer, Co. No. T150.

Q. Did the report indicate the name of the driver?

A. Shewokis.

Q. I note a comment respecting driver's log.

A. He was not showing mileage on his driver's daily log.

Q. Now what is the steering mechanism, fuel system, brakes, and so on?

A. Steering mechanism was all right; Fuel System, all [fol. 934] right; Hand Brake was all right; Tubing and Hose was all right; Breakaway working O. K.; Air-brake Warning Device working; Lights were in good order; Horn, Mirrors, Windshield Wipers, Speedometer, Tires were in good working order; Fire Extinguisher, Fuses, Flares, Flags, Spare Bulbs, Spare Fuses and Handtools were all O. K.

Q. Did you inspect the load and did you inspect the lading?

A. I did.

Exam. Baumgartner: What did you mean by that question, "Did you inspect the load and did you inspect the lading"?

By Mr. Mueller:

Q. I am sorry. Did you also examine the shipping papers?

Exam. Baumgartner: We will suspend for lunch until 1:30.

(Adjourned at 12 o'clock noon until 1:30 p.m.)

[fol. 935]

AFTERNOON SESSION

1:30 p.m.

Exam. Baumgartner: Ladies and gentlemen, come to order, please.

By Mr. Mueller:

Q. Now, Mr. Shea, at the beginning of the noon recess I believe we were discussing an exhibit which has been marked for identification as No. 31, and I believe that you have completed your comments respecting the safety check made of the vehicle in question. Now did you examine the contents of the vehicle designated on Exhibit 31?

A. I did.

Q. And will you now tell us what that inspection showed.

A. The vehicle had a shipment of 8 bags of Mohair moving on L. Nelson's Pro P30138 from Philadelphia, Pennsylvania to Auburn, Mass.

Q. Have you made a notation on the exhibit of that number?

A. When I made it out.

Q. Yes, and where does that show on the exhibit?

A. Up here under Statement as to Transportation, etc., near the top of the form.

Q. And did you find those 8 bags of Mohair on the equipment?

A. I did.

Q. And those were moving on Nelson's bills of lading, is that correct?

A. Yes.

[fol. 936] Q. Now did you find any other shipment in addition to those bags of Mohair on the equipment?

A. There was one 55-gallon drum of Emulsifier on the

vehicle for which the driver had no papers. Markings on the drum indicated it was going to Parregon Manufacturing Company, Millbury, Mass. from Reilley Man Walton Company.

Q. And there were no papers on the vehicle.

A. The driver had no shipping papers with him for this shipment.

Q. Now, Mr. Shea, on the day in question, namely, May 2, 1956, did you inspect another vehicle, and in the course of such inspection, did you prepare another Form SS-31?

A. I did.

Q. And did you, in connection with the examination of that vehicle, procure any shipping papers?

A. I did.

Q. And have you made up such Form SS-31 and such shipping papers in the form of an exhibit?

A. Yes, I did, I photostated each one.

Exam. Baumgartner: Two documents, one entitled Gilbertville Trucking Co., Inc. Delivery Receipt, No. R67856, and the other a report on a Driver-Equipment Compliance Check, dated May 2, 1956, are marked for identification as Exhibit No. 32, Witness Shea.

(Government's Exhibit No. 32, Witness Shea, was marked for identification.)

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[fol. 938] By Mr. Mueller:

Q. Now, Mr. Shea, looking at Exhibit 32, and specifically the second part of it, namely, the Driver-Equipment Compliance Check, will you give us the details as to the equipment inspected.

A. This equipment consisted of a tractor semitrailer combination, owned by L. Nelson & Sons Transportation Company of Rockville, Conn., inspected on May 2, 1956 on Route 15, Union, Conn. at 11:50 a.m. The combination consisted of International tractor, Co. No. 107 and a Struik semitrailer T125.

Q. Can you give us the name of the driver?

A. The driver's name was Avery.

[fol. 939] Q. Did you have some comment respecting his log?

A. His log was not indicating daily mileage.

Q. Did you have some comment there respecting a doctor's certificate?

A. His doctor's certificate was issued in June, 1955.

Q. Now jumping down to the items brakes, lights, parts and accessories and emergency equipment, did you find any violation of any of the Commission's requirements?

A. On all items checked, I found no defects.

Q. Now in connection with this vehicle inspection, did you examine the load?

A. I did.

Q. And have you made a notation on the exhibit respecting your findings as to the contents?

A. I have.

Q. Will you proceed to give us the information.

A. Inspection of the load showed that there were 10 shipments on L. Nelson & Sons paper, one shipment was moving on Pro P30173, wool waste from Philadelphia, Pa. to Woonsocket, R. I. I also found another shipment, or rather there were 9 other shipments on L. Nelson's paper. I said there were 10 shipments in all.

Q. Now did you find any other shipment on board that vehicle?

A. Yes, I did.

Q. Can you describe it?

A. A shipment of 2 cartons of rayon piece goods moving [fol. 940] on Gilbertville Pro R67856 from Rockville, Conn. to Woonsocket, R. I. was also on the vehicle.

Q. Now again referring to the Driver-Equipment Compliance Check, did the driver acknowledge receipt of the copy?

A. Yes, driver Avery signed for a copy and my signature appears also on the bottom.

Q. Now did you at that time inspect or have made available to you a Gilbertville Trucking Company pro covering the Gilbertville shipment which you have described?

A. I did.

Q. And is a copy of that pro the document which forms the first page of Exhibit No. 32?

A. It is.

Q. And will you further describe that portion of the exhibit, Mr. Shea.

A. This is a Gilbertville Trucking Co., Inc. Pro No. R67856, issued May 1, 1956 covering a shipment of 2 cartons of rayon piece goods on tubes, weight 158 pounds, consigned to the North American Textile, 84 Fairmount Street, Woonsocket, R. I., shipped by American Dye Corporation, Rockville, Conn. on a collect basis.

[fol: 944] Cross examination.

By Miss Kelley:

Q. Now your investigation of the Gilbertville Trucking Company resulted only from the fact that you saw a vehicle, I believe you testified on November 21, 1954.

[fol: 945] A. No, October 21, 1954 I observed the vehicle.

Q. October 21, I am sorry, but that was the basis for your investigation, was it not, because you saw that vehicle on October 21 with placards on the side showing it was leased to Gilbertville Trucking Company?

A. No.

Q. You stated that after seeing that vehicle you contacted Mr. LaCour.

A. That is right.

Q. Now, prior to contacting Mr. LaCour, did you check the records at the Boston office of the Commission as to the address of the Gilbertville Trucking Company?

A. No, I did not.

[fol: 946] By Miss Kelley:

Q. Did you check the files of the Commission to determine what those records showed with respect to the place of business of the Gilbertville Trucking Company?

A. Yes, I checked the records in the Springfield office.

Q. And did you find there an address of Hardwick Road in Gilbertville?

A. That is correct.

Q. Didn't you also find in the Commission's file some information with respect to Gilbertville Trucking Company's location at Ellington, Conn.?

A. No, I did not.

Mr. Mueller: May I ask to what period this inquiry is directed?

Exam. Baumgartner: I think she indicated just prior to his institution of this investigation to which he has testified, the investigation commencing in 1954.

Miss Kelley: Between the period October 21 and November 22, 1954, which is the period I believe he testified to.

By Miss Kelley:

Q. Now during 1955 and 1956, have you observed that the vehicles of Gilbertville which are leased from Nelson have a placard made of a plastic-coated nylon material? [fol. 947] A. I have.

Q. Now at what time of day did you arrive at the Gilbertville terminal on your first visit to their terminal?

A. About 1 p.m.

Exam. Baumgartner: Give us the date.

The Witness: The date was October 22, 1954.

By Miss Kelley:

Q. At the time that you arrived here, were there six drivers about the premises?

A. No, I didn't see any six drivers. I saw just Mr. Kashady and a Mr. Sullivan.

Q. You found records with respect to two drivers, can you give me their names?

A. Two drivers?

Q. That is what I understood you to say. Maybe to speed it up, Mr. Shea, can I ask you if the name of Gosselin and Kirby sound familiar to you?

A. Yes, they showed me a doctor's certificate of Gosselin.

Q. And also one for Kirby or some other man.

A. They only showed me one for Gosselin.

Q. In your previous testimony, you said that you saw two doctor's certificates.

A. I don't recall that.

Exam. Baumgartner: No. I think. Miss Kelley, you are confused. He testified there were drivers' logs for two drivers and one doctor's certificate for one driver.

[fol. 948] By Miss Kelley:

Q. Could be my notes are in error. When you visited the office at Ellington, Conn., you found a number of doctor's certificates, did you not?

A. We did.

Exam. Baumgartner: Which visit was that, on what day?

The Witness: November 9 and 10, 1954.

By Miss Kelley:

Q. Isn't it a fact that you found doctor's certificates at that office for the drivers whose names you gave us on direct examination?

A. That is correct.

Q. Now how many doctor's certificates would you say you found in the file at Gilbertville?

A. Between 50 and 60.

Mr. Mueller: Which carrier are we talking about?

Miss Kelley: Gilbertville Trucking Company.

By Miss Kelley:

Q. Did you find among those doctor's certificates records that showed some of those drivers were also employed by a number of other carriers such as All State, Associated Transfer, Adley's Express?

A. No, I did not.

Q. Did you look for such information on those doctor's certificates?

A. No, I did not.

(Discussion off the record.)

By Miss Kelley:

Q. When you mentioned the 50 or 60 doctor's certificates, [fol. 949] Mr. Shea, were you referring to the files of the Gilbertville Trucking Company at Ellington, Conn.?

A. I was.

Q. Now getting back to your visit to Gilbertville, I believe it was October 22, 1954.

A. That is right.

Q. You said that you inspected leases of Nelson to Gilbertville on that date.

A. I did.

Q. Did you copy any of those leases?

A. I did not.

Q. And at this time, you cannot tell us what vehicles were covered by those leases.

A. I could not.

Q. Whether these were tractors or trailers alone or tractor-trailer combinations.

A. I could not.

Q. Or straight trucks.

A. No.

Exam. Baumgartner: What leases are you referring to?

Miss Kelley: Mr. Shea testified, Mr. Examiner, that he checked leases from Nelson to Gilbertville when he called at the terminal of Gilbertville Trucking Company in Gilbertville, Mass. on October 22, 1954.

By Miss Kelley:

Q: And likewise, at this time, with respect to those [fol. 950] leases, you cannot tell us whether they covered a one-way operation or a round-trip operation or the specific points between which the vehicle was to travel.

A. They were all trip leases, but whether they were single trip or round-trip, I couldn't say, but they were all trip leases.

Q. Now on November 9, 1954, which I believe is the next date you have with respect to your inspection of this matter, you went to the office at Ellington, Conn.

A. That is correct.

Q. Now you said that you saw a sign designating Nelson's office; will you tell us where you saw that sign.

A. It is my recollection I saw a sign on the office building.

Q. Now, Mr. Shea, do you recall any other sign?

A. No, I do not.

Q. Mr. Shea, if you recollect the premises at Ellington,

Conn., the house that you referred to as an office is set back quite a bit from the road, isn't that true?

A. Oh, about 20 feet.

Q. And there is a double driveway into the premises.

A. Yes, there is a U-shaped driveway; you go in and go right around and come out again.

Q. Now do you recall a sign that is between the space for the driveway, about 25 yards from the office building?

A. I don't recall any sign like that.

[fol. 951] Q. What part of the building do you claim there was a sign on?

A. The sign, as I recall, was not on the building, but it was on a post.

Q. And is that the sign that I referred to that is out between the driveway?

A. It may be and it may be you and I are talking about the same sign. I can't recall the exact location of the sign.

Q. Do you agree there was no sign on the building, but there was one out near the entrance to the property, or somewhere in that vicinity?

A. It was on a post, as I recall it now.

Q. Do you know what the wording was on that sign?

A. No, I don't.

Q. Do you recollect that there is any arrow or anything else on that sign?

A. No, I don't.

Q. Now do you agree that there was no sign on the building which you designated as a sort of town house?

A. To the best of my recollection, there is only one sign that was on a post. The exact location, I couldn't locate it for you now.

Q. But do you agree that the sign was some distance from any building?

Mr. Mueller: I object, Mr. Examiner, to this repetition, [fol. 952] argumentative.

Exam. Baumgartner: Well, why don't you ask him how far the post bearing the sign was from the building.

By Miss Kelley:

Q. Can you tell us, Mr. Shea?

A. I couldn't tell you.

Q. Now there is a front door to that building, is there not?

A. I don't know.

Q. You didn't look for a front door, is that right?

A. I didn't.

Q. Do you normally walk around to the rear of any building and go in a rear door when you call on carriers making inspections?

Mr. Mueller: I object, Mr. Examiner.

Exam. Baumgartner: Why don't you ask him whether he entered the building, and, if so, through what door.

Miss Kelley: Mr. Examiner, they made quite a point on the examination that they entered through the rear door.

By Miss Kelley:

Q. Will you tell us what door you did enter by?

A. We entered a door which would be at the back of the house in relation to the street. We parked our car in this parking space and walked in the nearest doorway, which is the back door.

Exam. Baumgartner: The nearest door to what?

The Witness: To where we left our car parked. We parked across the yard, maybe about 40 or 50 feet and went [fol. 953] in the back door.

By Miss Kelley:

Q. Now I believe you said you saw some records with respect to Mr. Seiferth. Do you recall testifying with respect to him?

A. In relation to records?

Q. Yes.

A. No, I don't remember saying that.

Q. Do you recall your testimony with respect to the job classification of Mr. Seiferth?

A. No, I don't remember that.

Q. So that at the present time you have no recollection as to Mr. Seiferth's job classification.

A. He was a dock foreman or he had something to do with

the loading dock out at the back of the building, out at the other building, out back.

Q. What record did you see as to his job classification?

A. I didn't see any records as to his job classification.

Q. Did you learn what his duties were in and about the premises?

A. Only by observing him, that is all.

Q. Did you learn whether or not he was a member of any labor union?

A. No, I didn't.

Q. Did you check any payroll records to learn whether Mr. Seiferth was an hourly worker or just what his status was?

[fol. 954] A. No, I didn't.

Q. Now you said you found Mrs. Marjorie Edwards to be in charge of the L Nelson & Sons' office.

A. That is what she told me.

Q. And you said something with respect to Kenneth Nelson talking to her: I don't want the conversation, but did you observe Kenneth Nelson talking to Mrs. Edwards?

A. I did.

Q. Do you know whether or not that conversation involved interline shipments between Gilbertville and Nelson?

A. I do not know.

Q. Am I to understand that you do not know what the conversation was between Kenneth Nelson and Mrs. Edwards?

A. No, simply she would ask him a question; he would give her an answer.

Q. Now you offered some testimony with respect to the pro forms or billing forms used by the Gilbertville Trucking Company.

A. I did.

Q. And these forms showed the name of the Gilbertville Trucking Company written out.

A. Yes, they do.

Q. And they show a P. O. address of Gilbertville, Mass.

A. P. O. Box 58, Gilbertville, Mass.

Q. They show a main office, Gilbertville, Mass. and the [fol. 955] Gilbertville telephone number.

A. It does.

Q. Now do they show, among other points of service, New York, New England, Philadelphia and Wilmington, Delaware, New Jersey points?

A. Not on this copy I am looking at. I see nothing about Wilmington, Delaware.

Exam. Baumgartner: Exhibit what are you looking at?

The Witness: 22. I thought that was a phone number. Wilmington, Delaware is on there.

By Miss Kelley:

Q. And in respect to those matters, the pro of the Gilbertville Trucking Company is different than the pro of L Nelson & Sons, is it not?

A. In some respects.

Q. So that it would be a different plate of a printer that went in to print the pros, isn't that correct?

A. Not exactly.

Q. The name is different.

A. The name is different.

Q. And there is different information as to the points served by the two carriers.

A. In a few instances, yes.

Exam. Baumgartner: These pros were printed.

The Witness: Yes.

Exam. Baumgartner: For both companies?

[fol. 956] The Witness: Yes, they were both printed forms.

By Miss Kelley:

Q. Isn't it also a fact that the number series of L Nelson's pros is completely different than the numbering series of Gilbertville's pros?

A. The numbers wouldn't be the same, but as I recall, the numbers were in the same location on the form and the same little box was on the form.

Q. But the series is what I am asking you about.

A. The serial numbers would be different.

Q. They were completely different.

A. Yes.

Q. On November 9 and 10 you said that you checked pros of the Gilbertville Trucking Company, can you give me the pro numbers that you checked or the dates with respect to those pros?

A. What was the date again, please?

Q. Both November 9 and 10, 1954.

A. And you want to know the list of pros that I checked?

Q. Do you have a list of the pros you checked or the dates of those pros?

A. No, I have no list.

[fol. 963] Q. In referring to Exhibit 27 again, Mr. Shea, you have made a notation as to certain pro numbers on that inspection report, isn't that true?

A. Yes.

Q. Now isn't it proper to presume that all those pros were in order or you would have made some note?

A. No. I think they probably could well be in order, although there is quite a difference in the numbers, 9667, 9685 and 0624. They are not running right in sequence; they are in the same series.

Q. Didn't you find in checking records that the different [fol. 964] terminals had a different series so that it was not unusual for Gilbertville bills to have different series?

A. That would not be unusual.

Q. Did you make a copy of the lease which driver Claremont had on his vehicle, referring to Exhibit 27?

A. Did we make a copy of the lease?

Q. Yes.

A. I did not, no.

Q. After inspecting the vehicle of Mr. Claremont, you proceeded down to the Ellington terminal, is that correct?

A. That is correct.

Q. And you said that you observed there a list of drivers on a bulletin board.

A. The seniority list of L Nelson drivers.

Q. And wasn't that list a list that was prepared by the union and it showed that it was the union's list of drivers?

A. I do not know who prepared it.

Q. Did you notice any signature or name as to the person who had prepared what was on that list?

A. I didn't notice that.

Q. Or any reference to a union?

A. No. I know it was a bulletin and I noticed on the bulletin board it had seniority list of drivers of L. Nelson & Sons.

Q. Was there a similar list for the Gilbertville Trucking Company?

[Tol. 965] A. Where?

Q. On the premises on that bulletin board or elsewhere.

A. At Ellington?

Q. Yes.

A. No, just the one list.

Q. Now did you make any comparison with the names of drivers that were on that list as to drivers of other companies whose premises you may have inspected to know whether or not those drivers' names appeared on any other motor carrier's list of drivers?

Mr. Mueller: Mr. Examiner, I object. I think that is irrelevant.

Exam. Baumgartner: He may answer.

The Witness: I made no such check.

Exam. Baumgartner: Would there be any occasion for such a list on the Ellington premises?

The Witness: Of employees of other carriers?

Exam. Baumgartner: Yes.

The Witness: No, sir.

Miss Kelley: I didn't mean employees at Ellington. I meant as Mr. Shea in his work does the checking around and as he has checked other carriers in that area.

Mr. Mueller: That was the basis of my objection.

Exam. Baumgartner: Is that the way you understood the question?

[fol. 966] The Witness: Yes. I thought she was referring to my checking of other terminals.

Exam. Baumgartner: Seniority lists at other terminals of other carriers.

The Witness: That is right. I made no such checks because that is not my territory, ordinarily. I was down there on a special investigation.

Exam. Baumgartner: Well, do you make such checks in your own territory?

The Witness: That is common to notice that in every establishment that has union drivers, there is a seniority list of the drivers and drivers listed on the bulletin board.

By Miss Kelley:

Q. Did you find that both Gilbertville and the L. Nelson & Sons Company have union drivers; they are both union shops as far as employees are concerned?

A. I don't know about Gilbertville Trucking, but L Nelson I was sure was because there was a seniority list required by the union posted on the bulletin board.

Q. Now were the only occasions you visited Ellington, Conn. on November 10, 1954?

A. To the best of my recollection, those are the only two days I have ever been in that terminal.

Q. Now on November 10, did you see any bills of sale or other records with respect to equipment sold by L Nelson Company to Gilbertville Trucking Company?

[fol. 967] A. No, I did not.

Q. Now at the time that you were there, do you recall that on the desk of Kenneth Nelson there were some bills of sale involving equipment?

A. I don't recall that at all.

Q. You said that you learned that four tractors had been sold by the L. Nelson Company to the Gilbertville Trucking Company.

A. Kenneth Nelson told me that.

Q. And you said, as I recollect your testimony, that two of the tractors at that time had not been paid for, is that correct?

A. Kenneth Nelson stated that he still owed L Nelson Company for two tractors.

Q. Well, now, Mr. Shea, when you talked about trucks which you gave evidence on, do you recollect whether he was talking about a completed transaction with respect to trucks or a contemplated transaction with respect to trucks?

A. This was a completed transaction; these were vehicles he had bought from L Nelson Company.

Q. Are you referring to the tractors?

A. Tractors and trucks, four tractors and two straight trucks that he had purchased from L. Nelson and he told us he still owed them for two tractors.

Q. But did you see any bills of sale or any records in [fol. 968] connection with any of those sales?

A. I did not.

Mr. Mueller: Mr. Examiner, we have gone over this several times, it is repetitious.

Exam. Baumgartner: Yes, it is repetition.

By Miss Kelley:

Q. And, Mr. Shea, at this time, do you admit you can't remember any more than the rest of us what was said exactly two years ago?

A. Yes.

Q. So that you are relying on notes which you made.

A. That is correct.

Q. But as to the exact recollection as to the conversation which took place with respect to the two trucks, you can't remember it any more than I could.

A. I couldn't put it word for word, no.

Q. Now with respect to the repairs of the equipment of the Gilbertville Trucking Company, did you check the records of the company as to bills which it had received for repairs or was that something that you got only from conversation?

A. Mostly in conversation with Mr. Kenneth Nelson, although I did go up and visit their shops and talk to two of L. Nelson's mechanics.

Q. Did you check to find if there were bills from the International Harvester, for example?

A. I don't recall checking any bills.

[fol. 969] Q. You found, did you not, that their tractors were principally International tractors?

A. They were.

Q. But you checked no bills.

A. No, I didn't.

Q. And if I asked you about other companies, your answer would be you hadn't checked their bills either.

A. What other companies?

Q. For example, of the Strick Trailer.

A. We didn't check any repair bills of any company.

Q. My notes are not clear on this point, so that my understanding of your testimony, Mr. Shea, was that when you called at the terminal at Gilbertville, Mass. and made inquiry with respect to payroll records and accounting records, that you were told that they were not available at Gilbertville, but were available at Ellington, Conn., is that correct?

A. That is about what Mr. Kashady told me, that is right.

Q. And you found those records at Ellington, Conn.

A. Payroll records we saw and we saw account records, yes.

Q. On your Exhibit 29, Mr. Shea, you made reference to a Gilbertville Pro R16869, is that correct?

A. That is the number I have on this form.

Q. Is that a copy of the Pro No. 16869, Mr. Shea?

A. Yes, that is a penciled copy.

Q. Isn't it the exact copy? I mean, it is a delivery receipt [fol. 970] that shows the signature.

A. Apparently it is, that is right.

Q. A signed delivery receipt.

A. Yes.

Q. And now, Mr. Shea, you said, in answer to a question of Mr. Mueller's, that you did not know the weight of this shipment, so will you tell us what the weight is of that shipment.

A. The weight is 85 pounds.

Q. And that was the one case of machine rolls.

A. Machinery rolls.

Q. Now, Mr. Shea, when you look at that paper or pro in your hand, can you tell us if the weight was not written in and isn't it of the same type as the other handwriting showing the shipper and consignee and description of the amount?

A. Apparently it is, but it is a little bit above the item machinery rolls; it is not on the same line.

Q. Now that shipment shows that it moved from Pittsfield, Mass. to Fiskeville, Mass.

A. Either Fiskeville or Fisherville.

Q. Can you tell us where Fiskeville is?

A. I do not know.

Q. And Pittsfield, Mass., you do know where that is.

A. Yes.

Q. Can you tell us approximately where that is in the state of Massachusetts?

[fol. 971] A. It is in the western part of Massachusetts, about 60 miles west of Springfield and about 30 miles from the New York-Massachusetts state line, about half way between the Connecticut and the Vermont border.

Q. Does the bill show that was a minimum shipment?

A. It does. There is an MPM and a rate of \$2.45, which indicates a minimum.

Q. Which indicates the fact that it is a minimum shipment.

A. That is right.

Q. Mr. Shea, how do you inspect, I think you called them rocker beams?

A. Rocker bearings. It is a visual inspection.

Q. Where are rocker bearings on a vehicle?

A. That is the bearing in which the lower half of the fifth wheel rocks back and forth. In other words, they are really bearing feet that support the lower half of the fifth wheel on a tractor.

Q. Is the vehicle stopped when you make that inspection?

A. Oh, yes, you could see the bolts loose on it.

Q. And the trailer sits on top of this thing?

A. The top half of the fifth wheel, which is on the trailer, sits on the lower half of the fifth wheel which is on the tractor. This tractor lower half rocks back and forth supported on bearings on each side and then these bearing feet support the lower half of the fifth wheel and those, in [fol. 972] turn, are bolted onto the bed plate, and my item there, meant that the rocker bearing feet were loose on the bed plate because the bolts had become loose.

Q. That appeared from a visual inspection.

A. You could see the bolts were less than hand tight.

Q. Now tell me where is a reach rod on a truck.

Exam. Baumgartner: While we are on the subject, is there another name for this reach rod?

The Witness: Pitman arm.

By Miss Kelley:

Q. Where is that on the tractor?

A. It usually runs from the drag link forward to the steering connections to the tie rods, king pin connections.

Q. That is under the truck, is that right?

A. That's right.

Q. Now to make an inspection of the reach rod, as you call it, is it necessary to go under the truck?

A. You can look under and observe it; while somebody works the wheel real fast, you can observe the play.

Q. That, too, is a visual inspection.

A. True.

Q. Is your inspection of parts under the trucks a visual inspection?

A. Not always.

Q. Well, I mean, in any that are reported in these three reports that you have here of the items that you tested.

[fol. 973] A. When I say visual, I might take hold of the wheel myself and swing it back and forth; I might climb in the cab and try the brakes myself; I might take the fire extinguisher down and try it.

Q. To see anything under the truck, you would have to be on the outside.

A. No, I would crawl underneath it; I wear white jumpers when I work.

Q. On these three, did you crawl under?

A. Which ones?

Q. You referred to Exhibit 32, 31 and Exhibit 30.

A. In any of these, I wouldn't be able to answer at this time whether I crawled underneath or not, it is so long ago.

Q. Mr. Shea, do you recall you testified that on one of these shipments of vehicles of the E Nelson Company there were spools?

A. Yes, shipment of spools.

Q. That also refers to Exhibit No. 29, is that correct?

A. Yes.

Q. Do you recall whether those spools were packed or transported loose without packing?

A. I couldn't say. They might have been great big wooden reels; they might have been in cartons; they might have been in bags. I couldn't say now.

Q. You don't know?

[fol. 974] A. I don't know.

Exam. Baumgartner: We will take a ten minute recess.

(Short recess.)

Exam. Baumgartner: Ladies and gentlemen, let's come to order. You may proceed, Miss Kelley.

By Miss Kelley:

Q. With respect to Exhibit 31, Mr. Shea, did you make an investigation to determine if the consignee, which I believe to be Paregon Manufacturing Company, is engaged in the textile business?

A. I did not.

Q. Now with respect to your testimony about the vehicle seen at Newton, which you said was driven by a driver Erb, do you have a record as to where Mr. Erb drove that truck; where did he go?

A. Do I have a record?

Q. Did you see records on which you base your testimony as to where he went?

A. Yes, one shipment was going to Scituate or Cohasset. I have got it here if I can have a minute. This delivery was to Cohasset, Massachusetts, which is outside the Boston Commercial Zone.

Q. Other than the reference to Cohasset, did you copy any records so that you could tell us what the lading was on that truck?

A. No, I didn't.

[fol. 975] Q. Now you said that at the Newton terminal you checked certain manifests of the L. Nelson & Sons Company.

A. Yes.

Q. Isn't it a fact, Mr. Shea, that the manifests of the L. Nelson Company are one or more sheets covering all of the shipments moving out of the particular terminal on a particular day?

A. Those manifests are wide sheets and they show movements of outgoing freight going out of that terminal listed by dates, pro numbers.

Q. Isn't it a continuous list for each day?

A. There might be two or three trailers on one sheet.

Q. They are not separate manifests for each truck.

A. No, not that I recall.

Q. But a continuous one.

A. Yes.

Q. As far as the Gilbertville manifests that you saw, did they also reflect the shipments for a total day that went out of a particular terminal?

A. Yes, the date and the pro would show and some other information, but it wouldn't show just what vehicle moved forward, whereas the L Nelson manifests would show that.

Q. Isn't it a fact, though, that neither one of them show exactly on what vehicles the freight moved?

A. Oh, yes, the L Nelson & Sons manifests show the [fol. 976] trailer number on which the freight went forward out of the terminal.

Q. Now do you know what dates were covered by the manifests that you checked?

A. These were manifests in September, October and November, 1955.

Q. Now you stated that you asked for certain records at the Newton office, and was that the same situation as at Gilbertville, Mass., that you learned that the records were kept at Ellington, Conn.?

A. I do not know because I did not go back to Ellington after this.

Q. Mr. Shea, you said that you saw five cartons on a vehicle at Newton, and was that also on November 8, 1955?

A. Yes.

Q. Now you did not see that vehicle unload, is that right?

A. No, I didn't.

Q. And the following morning, I believe you said that

at 6:30 in the morning you appeared at the terminal in Newton.

A. Yes, the following morning at 6:30 a.m. I was back at the terminal.

Q. Now do you know how many vehicles moved in and out of the Newton terminal between 6 o'clock or 6:30, whatever time you left it on November 8, 1955, and before you appeared there on November 9, 1955?

A. I wouldn't know.

[fol. 977] Q. And, likewise, you wouldn't know what freight had passed over their platform there during those hours.

A. I wouldn't know.

Q. And the following morning, you said you saw two cartons on the platform at the Newton terminal.

A. I saw two cartons that I had seen on the truck the day before, yes.

Q. Can you identify the cartons for us?

A. Yes. I identified the cartons in this way. On the first day I was there, on the 8th, when there was a question about these cartons, I climbed up into the truck and got some identification off the cartons, consignees' names. I saw these same names on these cartons on the platform and the cartons were very similar to those that I had seen on the truck the day before.

Q. Mr. Shea, there could have been another shipment for the same consignee of the same type cartons come in during the night, isn't that right?

A. It could so happen.

Q. I believe you testified you did not know what was in those cartons.

A. No, I had no idea what was in the cartons.

Q. Now, Mr. Shea, on May 2, 1956, there was a road check at Union, Conn. Who participated in that road check?

A. You mean Commission personnel?

[fol. 978] Q. Commission personnel and other people who participated in it.

A. We had four Connecticut State Troopers, State Police; we had two Connecticut D.P.U. Inspectors and four Inspectors from the Connecticut Motor Vehicle Department.

and there was present for the Commission, District Supervisor LaCour and myself, District Supervisor Noble of Hartford; District Supervisor Virmback of New York, Safety Inspector Edmunds of Hartford, Conn., and District Supervisor Pollard.

Q. And he is connected with the Boston office, is that correct?

A. That is right.

Q. Now what was the procedure followed on that day? Was every truck stopped that came along that road or was there a selectivity as to the trucks to be stopped in checking?

A. They stopped every truck that came along and I objected to the procedure because they were delaying the trucks. They stopped every truck that came along.

Q. There was a long line of trucks?

A. Yes, there was.

Q. Now did one or more people engage in the inspection of each vehicle?

A. No. Usually each Commission-employee would inspect one vehicle and there would be only one Commission employee at a time inspecting a vehicle, usually.

[fol. 979] Exam. Baumgartner: You mean ICC employee?

The Witness: That is right, although the State Police and D.P.U. and Motor Vehicle Inspectors would be looking at them all at the same time.

By Miss Kelley:

Q. Do you know how many vehicles of the Gilbertville Trucking Company were inspected on that date?

A. How many altogether?

Q. Of the Gilbertville Trucking Company, yes.

A. No, I don't know.

Q. Do you know how many vehicles that you were involved in the inspection of on that date?

A. Gilbertville?

Q. Gilbertville vehicles.

A. No Gilbertville trucks, as I recall.

Q. I will just refresh your recollection. I show you a Bureau of Motor Carrier Compliance Report, dated May 2, 1956, on the Gilbertville Trucking Company, showing a place of inspection on Route 15, Union, Conn. and your name is signed at the bottom of that report, Mr. Shea.

A. That is right. That is one Gilbertville truck I inspected.

Q. And outside of a question with respect to a reflector and a stop light, there was no criticism of that particular vehicle.

A. The driver Solemy did not show mileage of his log; other than those three items.

Q. Now I show you an inspection report of the same date, [fol. 980] May 2, 1956, which shows that it was inspected by John G. Edmunds.

A. Safety Inspector Edmunds of Hartford.

Exam. Baumgartner: Just a minute, when was this and where and by whom?

The Witness: May 2, 1956.

Mr. Mueller: Mr. Examiner, this is going beyond the scope of the direct examination, I submit.

Miss Kelley: Mr. Shea said he participated in it so I think I have a right to ask if he participated in these inspections.

Exam. Baumgartner: Was this inspection made at the time and place that you mentioned awhile ago?

The Witness: The same place, and this one is at 9:55 a.m. It is the same place, at a different time during the same day.

Exam. Baumgartner: Were you there?

The Witness: I was in the vicinity, Mr. Examiner.

Exam. Baumgartner: Part of a common project.

The Witness: This second sheet, she is referring to Edmunds. I had nothing to do with that inspection whatsoever.

Miss Kelley: That is what I wanted to ask him. That answers the question.

By Miss Kelley:

Q. Are you familiar enough with the Bureau of Motor Carriers' Reports to tell us if that inspection report re-[fol. 981] flects that the vehicle, with the exception of one mechanical complaint, appeared to be in order?

Mr. Mueller: Just a minute, Mr. Examiner.

Miss Kelley: I am asking him if he is familiar enough with these reports.

Exam. Baumgartner: The answer is either yes or no, Mr. Witness.

The Witness: Familiar enough for what purpose now?

Exam. Baumgartner: If you are familiar enough with that report to—

Miss Kelley: Tell us, insofar as the inspection of that vehicle is concerned, was everything found in order with the exception of a mechanical criticism.

The Witness: There is no mention of the driver's log.

Exam. Baumgartner: In other words, are you familiar enough with this report to testify as to what it contains?

The Witness: Yes.

Exam. Baumgartner: All right. Now what is your next question.

By Miss Kelley:

Q. Well, now, will you tell us, insofar as that report is concerned, if it shows that the tractor and trailer were leased from L Nelson and the leases were O. K. and the vehicle identified O. K.

A. That is an item under "Remarks," that is correct.

Q. And there was one criticism of air-brake warning [fol. 982] device, is that correct?

A. Air-brake warning device inoperative, not working.

Exam. Baumgartner: The report reflects that?

The Witness: And the report reflects two lights out and there is no comment on the driver's log.

Mr. Mueller: Now, Mr. Examiner, I wish to renew my objection.

Exam. Baumgartner: I think he can testify as to what the thing reflects. I think he is familiar enough with what

is in the report, but that is not to be taken as testimony that what the report reflects is true or reflects the facts. All he is testifying to is to what the report shows. I think that he is qualified to do that.

By Miss Kelley:

Q. Now, Mr. Shea, I show you another report. This is the usual form of inspection report.

A. Yes.

Exam. Baumgartner: Now, just a minute, give us a little more identification of the report concerning what you are inquiring about.

By Miss Kelley:

Q. Is that the SS-31 form of the Commission and it is dated May 2, 1956, shows time of 11 a.m., shows the name of the carrier as Gilbertville Trucking Company, Inc., Gilbertville, Mass., and the place of inspection Route 15, Union, Conn.?

A. That is correct.

[fol. 983] Q. Do you recognize that as another vehicle that would have been inspected at the time and place you testified to with respect to the surprise inspection at Union, Connecticut?

A. On the same date at the same location, yes.

Exam. Baumgartner: Now what you are testifying to is what is reflected in the report.

The Witness: The report shows that it was prepared there; I don't know whether it was or not.

Exam. Baumgartner: You don't know whether these matters are fact or not.

The Witness: Just it appears that way from the paper I am looking at.

Exam. Baumgartner: Let it be understood that is all you are testifying to, the report reflects these things.

By Miss Kelley:

Q. And it shows that the driver of that vehicle was Charles Botti.

A. Yes.

Q. Now the inspection shown on that report is Mr. LaCour's, is that correct?

A. That is right.

Q. Now, Mr. Shea, did you inspect this vehicle with Mr. LaCour?

A. I did.

Q. And you climbed into this vehicle and you saw what the freight was on the vehicle.

[fol. 984] A. Either Mr. LaCour or I climbed into the vehicle, I am not sure which now. One LaCour climbed up on the top of it; I think this is the one.

Exam. Baumgartner: Now, just a minute, am I to understand that you participated in this inspection?

The Witness: Yes.

Exam. Baumgartner: Which is reflected in this report.

The Witness: Yes.

Exam. Baumgartner: Then you can testify as to the facts.

The Witness: I participated in the inspection of this particular truck, just this one and the one with my name on it too. The one of Edmunds', I had nothing to do with.

Miss Kelley: That is what I am trying to find out, which he participated in.

Exam. Baumgartner: Do you have an objection?

Mr. Mueller: I was going to submit, Mr. Examiner, that we are getting at this out of order, so to speak. I expected to put Mr. LaCour on the stand and have him testify respecting what I believe to be an SS-31 that he made out in his own handwriting.

Exam. Baumgartner: He won't be precluded from testifying with respect to this inspection, but since the subject of the road inspection of vehicles on that date and place was opened up on direct examination, I believe that Miss Kelley has the right to make some cross examination about it and [fol. 985] I think I will permit her to go ahead.

By Miss Kelley:

Q. Do you recall that you had some discussion with driver Botti?

A. I had no discussion with driver Botti.

Q. I will refresh your recollection, possibly, in connection with it. This shows an inspection at 11 a.m., is that correct?

A. That is right.

Q. Now did Mr. LaCour go to lunch and when he came back there was some discussion in connection with this vehicle and during the period that Mr. LaCour was at lunch, didn't you have some conversation with driver Botti?

A. I can't identify the particular driver. I talked to quite a few drivers that day. I think I inspected 24 trucks and I don't recall talking to driver Botti individually.

Q. Do you recall what freight was on this particular vehicle?

A. No, I do not.

Q. Do you recall identifying yourself to driver Botti and showing your credentials?

A. No, I don't recall that.

Q. Do you recall requesting driver Botti to open the truck so you could inspect the contents of it?

A. Not driver Botti individually. I requested several drivers that day to open their vehicles for inspection.

Q. As to this particular driver.

A. I do not recall requesting driver Botti individually to [fol. 986] open his truck.

Q. And you don't recall getting inside this truck and inspecting it.

A. Not that one individually, no.

Q. Now I show you another SS-31 report dated the same date, May 2, 1956, showing the time as 9:05 a.m., Gilbertville Trucking Company, Inc., Gilbertville, Mass., Route 15, Union, Conn., and it shows it was inspected by LaCour. Did you assist at all or have any part in the inspection of that particular vehicle?

A. No, I did not.

Q. Mr. Shea, do you recall how many vehicles of the L Nelson & Sons Transportation Company were inspected on that day?

A. I inspected three.

Exam. Baumgartner: We are talking about this same time and place and same inspection, is that right?

The Witness: I don't know how many it was on that day of L Nelson's.

Exam. Baumgartner: Miss Kelley, you are referring to the same time and place?

Miss Kelley: Yes, sir, same time and place, I believe.

Exam. Baumgartner: I mean the same day and place.

Miss Kelley: That is right.

Exam. Baumgartner: And the same general road check made that day.

[fol. 987] Miss Kelley: That is correct.

By Miss Kelley:

Q. The first record I have of the L Nelson & Sons Company is one that shows your name and I believe you have already identified it. It is in evidence.

A. Yes.

Exam. Baumgartner: You mean that particular road check report is in evidence?

The Witness: Yes.

Exam. Baumgartner: As an exhibit?

Miss Kelley: As Exhibit 32.

Exam. Baumgartner: As part of Exhibit 32.

By Miss Kelley:

Q. Mr. Shea, I show you another inspection report dated the same date, May 2, 1956, shows L Nelson & Sons Company, Bockville, Conn., place of inspection, Union, Conn., Route 15, and that shows that it was inspected by Mr. Pollard.

A. Correct.

Q. Did you participate in that inspection?

A. I did not.

Q. From your knowledge of the reports of the Commission, there is a criticism on that report with respect to the driver's log, is that correct?

A. That is the only criticism, driver Frank Kashady, Jr., no log.

Q. And the second one that I show you has been testified [fol. 988] to by you as being Exhibit 31 in this proceeding

as a truck of the L Nelson & Sons Company that was inspected at that time at Union, Conn.

A. That is right.

Q. And the next one I show you is one that is in the record as Exhibit 32.

A. That is right.

Q. Now I show you another inspection report, SS-31, 5/2/56, shows the date and the time is shown as 11:45 a.m. It is a vehicle of the L Nelson & Sons Transportation Company, Rockville, Conn., place of inspection, Route 15, Union, Conn., and that is shown to be driver John L. Walters, is that correct?

A. Yes.

Q. And it is shown that that vehicle was inspected by Mr. LaCour.

A. That is right.

Q. Did you assist Mr. LaCour in the inspection of that vehicle?

A. I did not.

Q. From this inspection report, with the exception of some mechanical criticism, is there any other criticism on the vehicle?

A. There were two lights out and a defective parking brake.

Q. Now I show you another SS-31 report covering a vehicle of the L Nelson & Sons Company shown to have [fol. 989] been inspected and the date shown is 5/2/56, time 10:10 a.m., Route 15, Union, Conn., and the driver's name, I believe, is Smith.

A. Yes.

Q. And do you recognize that as an SS-31 report of the inspection of the vehicle of L Nelson at the same time and place as the other inspections at Union, Conn.?

A. It is.

Q. With respect to that vehicle, there is a criticism of driver's log and mechanical criticism.

A. The driver had no log with him and he had no doctor's certificate.

Exam. Baumgartner: Did you participate in making this inspection?

The Witness: No, I did not.

Exam. Baumgartner: You are just testifying as to what that report reflects, not as to the facts.

The Witness: That was prepared by Mr. LaCour.

By Miss Kelley:

Q. But there are no criticisms on the load.

A. Not that I notice on that, no.

Q. Now, Mr. Shea, since May 2 of 1956, have you engaged in other inspections at either Union, Conn. or at other points of the vehicles of the L Nelson & Sons Transportation Company?

A. I have.

Mr. Mueller: I object, Mr. Examiner. This is beyond the scope of direct.

[fol. 990] Exam. Baumgartner: Well, she just asked him if he had done so. Now let's wait and see what the next question is, Mr. Mueller.

By Miss Kelley:

Q. Do you recall on what dates since May 2, 1956 you have inspected vehicles of the L Nelson & Sons Transportation Company?

A. I don't recall the dates.

Q. I now show you—

Mr. Mueller: Mr. Examiner, Miss Kelley is now apparently going into another series of inspection reports.

Exam. Baumgartner: What inspection do you maintain that these reports you have in your hand relate to, what day?

Miss Kelley: I show it to refresh Mr. Shea's recollection. The date is shown as May 4, 1956 and he is shown as the inspector on this report.

The Witness: That was the same check only on a different date.

Exam. Baumgartner: Part of the same check?

The Witness: We were there for three days.

Exam. Baumgartner: You may answer.

By Miss Kelley:

Q. Mr. Shea, this SS-31 report shows the vehicle to be L. Nelson & Sons Transportation Company, inspected on May 4, 1956 at Route 15, Union, Conn. Is there any criticism of the lading that was on that vehicle?

A. No criticism of the lading.

[fol. 991] Exam. Baumgartner: That was signed by whom?

Miss Kelley: Signed by Mr. Shea as the inspector.

By Miss Kelley:

Q. Mr. Shea, I show you another inspection report of the L. Nelson & Sons Transportation Company, also dated May 4, 1956, and the time shown is 11:50 a.m., inspection took place at Route 15, Union, Conn., and I believe it was shown to have been inspected by Mr. LaCour.

A. True.

Q. From your knowledge of the reports of the Commission, is there any criticism of the lading that was carried on that vehicle at the time of the inspection?

Exam. Baumgartner: As shown by the report.

Miss Kelley: As shown by the report.

The Witness: Not on the lading, no.

By Miss Kelley:

Q. Mr. Shea, I show you another SS-31 report dated May 4, 1956, time 10 a.m., place of inspection, Route 15, Union, Conn., and that is a vehicle of the L. Nelson & Sons Transportation Company, is that correct?

A. Right.

Q. And that is shown to have been inspected by Mr. LaCour.

A. Correct.

Q. From your knowledge of the forms of the Commission, would you state that there is no criticism of the lading carried on that vehicle according to this report?

A. The only notice of lading, it says, "Wool, Rockville,

[fol. 992] Conn. to Woonsocket, R. I." Apparently there is no criticism of the lading.

Exam. Baumgartner: You mean the report shows no criticism.

Miss Kelley: What I asked him was what the report shows.

By Miss Kelley:

Q. Mr. Shea, I show you another inspection report of the vehicle of L. Nelson & Sons Transportation Company, shown inspected 5/4/56 at 10 a.m., Route 15, Union, Conn., and the driver is shown as Edwards and that was inspected by you, Mr. Shea.

A. Correct.

Q. Now in making out this report, Mr. Shea, is it correct that you had no criticism of the lading carried on that vehicle?

A. Correct.

Q. Now, Mr. Shea, I show you another SS-31 report on 5/4/56. It shows inspection of vehicle of the L. Nelson & Sons Company, date was 5/4/56, time 9 a.m., Route 15, Union, Conn., and this, likewise, shows an inspection by you, doesn't it, Mr. Shea?

A. Correct.

Q. And is it true that this report shows no criticism of the lading carried on the vehicle?

A. No, no criticism of the lading on that particular report.

Q. Mr. Shea, do you recall any other occasions since May 2, 1956 when you inspected vehicles of the L. Nelson & Sons Company?

A. Yes, I do.

[fol. 993] Q. At road checks?

A. At road checks.

Q. When?

A. I can't remember the dates. I think at Brim field.

Exam. Baumgartner: Was that some time subsequent to this road check of May 2, 3 and 4?

The Witness: I think it was, Mr. Examiner.

[fol. 994] By Miss Kelley:

Q. Mr. Shea, have you also examined vehicles of the Gilbertville Trucking Company since May 2, 1956 in various road checks?

Mr. Mueller: Objection, same reason.

Exam. Baumgartner: Let him answer. He hasn't said yes or no. Maybe we will get a no answer and won't have to worry.

The Witness: No, on Gilbertville Trucking.

By Miss Kelley:

Q. Do you recollect making such an inspection on August 23, 1956 at Brimfield, Mass. in the vehicle of Gilbertville Trucking Company?

Exam. Baumgartner: Do you recollect it?

The Witness: I recollect making some inspections of Gilbertville and Nelson trucks, but I don't recollect where and the date I made them.

Exam. Baumgartner: Was it some time subsequent to May?

The Witness: It was subsequent to May 2, 3 and 4.

[fol. 995] By Miss Kelley:

Q. Now prior to May 2, 1956, Mr. Shea, had you, at various times, inspected vehicles of the E. Nelson & Sons Company?

A. I have.

Exam. Baumgartner: You mean times or occasions other than those to which he testified on direct?

Miss Kelley: Yes, other than those to which he testified on direct.

Mr. Mueller: Objection, Mr. Examiner.

By Miss Kelley:

Q. And, Mr. Shea, do you also recall inspecting the vehicles of the Gilbertville Trucking Company at various times and places other than those that you have testified to on direct?

A. Prior to May 2, yes.

Exam. Baumgartner: Other than those you testified to on direct?

The Witness: Yes.

Mr. Chilberg; I would like the ICC to know I appreciate their checks and I might be one in many that do.

Miss Kelley: That is all I have, Mr. Examiner.

Redirect examination.

By Mr. Mueller:

Q. Mr. Shea, on the occasion of your first visit to the Gilbertville terminal, did you find a terminal at an address on Hardwick Road in the town of Gilbertville?

A. I did not.

[fol. 996] Q. Did you have some difficulty finding the place?

A. I did.

Q. And where did you ultimately find it?

A. I found the terminal at the Ware Airport, Ware, Mass.

Exam. Baumgartner: Mr. Shea, is this Hardwick Road at Gilbertville a mailing address or does that purport to give the location of the terminal?

The Witness: According to our records, it is supposed to give the location of the terminal.

Exam. Baumgartner: A great many people confuse mailing addresses with locations.

The Witness: They had a mailing address.

Miss Kelley: Mr. Examiner, I might state that a P. O. number is given as the mailing address, and it is my understanding that Hardwick Road is definitely a street address on which the terminal is located.

[fol. 999] The Witness: Gilbertville is a community in the town of Hardwick and it is right on the southern border of the town of Hardwick. As you come out of Gilbertville, you cross a bridge and you are immediately in the town of Ware; then you go along down a short distance and you

go through another town by the name of Braintree and then you go back in the town of Ware. I am talking about Route 83.

Exam. Baumgartner: Does Gilbertville have a Post Office?

The Witness: Gilbertville has a Post Office.

Exam. Baumgartner: Does Hardwick have a Post Office?

The Witness: I believe it has.

Exam. Baumgartner: Does Ware have a Post Office?

The Witness: It has. Ware is a town by itself. It is a good-sized town.

Exam. Baumgartner: Well, I think it is pretty well covered in the record where Ware is and where the terminal is and you people have to make the most of it in your briefs.

By Mr. Mueller:

Q. Is there any particular point in going in the back door of the premises at Ellington, Conn. on the occasion of your first visit or was it merely a matter of convenience?

A. It was the most convenient. We saw others using the same door.

Q. Now when you interviewed this driver at North Somers on the 10th of November, 1954, did you talk with him?

[fol. 1000] A. Yes.

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[fol. 1001] By Mr. Mueller:

Q. Did you ascertain from the driver where he had originated his trip?

A. I did.

Q. And where was that?

A. He told me he started at Ellington, Conn. at the Rockville terminal.

Q. Did he tell you where he was bound when you saw him?

A. He said he was on a Gilbertville trip to Pittsfield, Mass.

Q. Did you ask him whether he was going through Monson, Mass.?

A. I did.

Q. What did he say?

A. He said he did not go through Monson, Mass.

Q. And was he going through Monson on the day in question?

Miss Kelley: I object, again, to this question.

Exam. Baumgartner: Wait a minute, Miss Kelley. How would this witness know whether he went through Monson?

Mr. Mueller: I am merely asking him about the conversation, Mr. Examiner.

Miss Kelley: I move that all these questions be physically stricken from the record as improper and purely hearsay.

[fol. 1002] Exam. Baumgartner: I will have to deny the motion, Miss Kelley. I have permitted it to go in subject to your objection and if it turns out in the briefs that are written that I was wrong about permitting it, it will be completely disregarded in the disposition of these matters.

By Mr. Mueller:

Q. May we have an answer to the last question, which was whether the driver indicated that he was or was not going through Monson on the day in question?

A. He said he was not going through Monson. He said he was going on Route 83 to U.S. 5 to Springfield, to Holyoke, then west on Route 9 to Pittsfield and return over the same route.

Exam. Baumgartner: You don't know whether he went that way or not, do you?

The Witness: Not of my own knowledge, Mr. Examiner.

Mr. Mueller: That is all, Mr. Examiner.

Exam. Baumgartner: Any other recross, Miss Kelley?

Recross examination.

By Miss Kelley:

Q. Was that the only day on which you inspected that vehicle of that driver, November 10?

A. That is correct.

Q. And that was November 10, 1954, is that correct?

A. Yes.

Miss Kelley: That is all.

Further redirect examination.

By Mr. Mueller:

Q. Now on that point, Mr. Shea, you now say unequiv-
[fol. 1003] ocaly you never inspected that vehicle or that
driver on any other occasion.

A. I may have misunderstood Miss Kelley, but I thought
she referred to the same time and place and location.

Miss Kelley: That was how I intended to restrict it at
that point on that route.

Mr. Mueller: If that was the question, I withdraw my
objection.

The Witness: I never recall inspecting that driver or
that vehicle on that route again.

Mr. Mueller: That is all.

Exam. Baumgartner: Well, Mr. Shea, you may be ex-
cused subject to call in the morning.

(Witness temporarily excused.)

(Short recess.)

Exam. Baumgartner: Let us come to order, please.

JOSEPH H. LaCOUR was sworn and testified as follows:

Direct examination.

By Mr. Mueller:

Q. Mr. LaCour, will you state your name and address for
the record.

A. Joseph H. LaCour.

Q. What is your occupation and business?

A. District Supervisor and Examiner for the Interstate
Commerce Commission.

[fol. 1004] Q. How long have you occupied that position,
Mr. LaCour?

A. Twenty-odd years.

Q. And at what point is your office located?

A. 420 Federal Building, Springfield, Mass.

Q. Are you what is known as a District Supervisor?

A. I am.

Q. You have a territory assigned to you?

A. I do.

Q. Can you tell us roughly what it comprises?

A. Points in Massachusetts west on and west of Mass. highway 12.

Q. How long have you lived in Springfield and vicinity?

A. More than 20 years.

Miss Kelley: I object, it is immaterial.

By Mr. Mueller:

Q. Prior to going with the Commission, did you have a position with another agency?

A. I did.

Q. Namely?

A. The Registry of Motor Vehicles.

Exam. Baumgartner: Massachusetts?

The Witness: Yes, sir.

By Mr. Mueller:

Q. Now, Mr. LaCour, you were present during all of Mr. Shea's testimony, I believe.

A. I was.

Q. And did you participate in questioning Kenneth Nelson [fol. 1005] son and other employees at Ellington, Conn. on November 9 and 10, 1954?

A. I did.

Q. Now, Mr. LaCour, Mr. Shea mentioned Gilbertville time cards in his testimony. Did you address any questions to Mr. Kenneth Nelson on the subject of apparent overlapping or common using of employees by the two carriers?

Miss Kelley: I object.

Exam. Baumgartner: Would you please establish when and where; include in your question time and place.

Mr. Mueller: I thought I had done that in my preliminary

question. I referred to the period of November 9 and 10, 1954.

Exam. Baumgartner: Oh, I am sorry; I missed that.

Miss Kelley: I object to the question as calling for hearsay.

Exam. Baumgartner: My ruling would be the same as it was previously and subject to your objection.

(Discussion off the record.)

By Mr. Mueller:

Q. I asked you whether you questioned Mr. Kenneth Nelson about an apparent overlapping and common use of employees.

A. I did.

Q. And will you tell us what he said.

[fol. 1007] The Witness: Mr. Nelson stated that an employee might be employed by Gilbertville Trucking Company during a payroll period and by Nelson Trucking Company during the same payroll period, and even during the same day the same situation might exist; let us say, an employee might work for the same companies during the course of the one day.

Exam. Baumgartner: Let me get this straight, you mean the same employee would be working for two masters at the same time?

The Witness: No, sir. During the same day he might work for two masters or during the same payroll period he might work for two masters.

By Mr. Mueller:

Q. Did you ask him for comment upon the duplication of drivers' medical certificates, concerning which there has been testimony here?

Miss Kelley: I object, same grounds.

Exam. Baumgartner: That is part and parcel of the same objection, isn't it, Miss Kelley?

[fol. 1008] Miss Kelley: Yes, sir.

Exam. Baumgartner: The same ruling will stand, but I

think the question was a little bit muddy, to me at least, unclear. What do you mean by a duplication of doctors' certificates?

Mr. Mueller: Well, Mr. Examiner, there has been testimony here that there were medical certificates in the possession—

Exam. Baumgartner: —of both companies for the same driver.

Mr. Mueller: That is another way of saying it, yes.

Exam. Baumgartner: All right, you may answer.

The Witness: Mr. Nelson replied that that was done as a precautionary measure to assure compliance with this Commission's safety regulations.

By Mr. Mueller:

Q. Now did you examine the Gilbertville records to ascertain whether or not Gilbertville actually made use of all of the Nelson drivers for whom it had medical certificates in its file?

A. I did.

Q. And what did you find?

A. I found that some of the Nelson drivers were not used by Gilbertville.

Exam. Baumgartner: What is the other side of the coin, then? You said you found that some of the drivers were not used by Gilbertville; now what is the other side, the affirmative?

[fol. 1009] The Witness: And that some of them were used.

By Mr. Mueller:

Q. Now, Mr. LaCour, were you present with Mr. Shea on November 10, 1954 when the vehicle was stopped and driver Claremont was questioned as indicated by Mr. Shea in his testimony?

A. Yes, I was.

Q. If I asked you the same questions which I asked of Mr. Shea regarding that incident, would your answers be substantially similar to his?

A. Yes.

Miss Kelley: Now I want to object to that because I, frankly, don't know what testimony Mr. Mueller is referring to, Mr. Examiner. He asked certain questions on cross examination and my memory isn't good enough to know all that Mr. Shea said on direct too at this time.

Exam. Baumgartner: Do you mean by that that you want Mr. Mueller to examine Mr. LaCour at length to cover the same ground?

Miss Kelley: What I would like to know, is Mr. Mueller limiting it to the questions that he asked on redirect?

Exam. Baumgartner: No.

Mr. Mueller: Definitely not.

Exam. Baumgartner: I think what he intends to inquire about is whether his answers would be the same as [fol. 1010] Mr. Shea's for the same questions on direct, on cross, on redirect, on recross concerning what?

Mr. Mueller: Concerning the vehicle inspection which occurred at North Somers on November 10, 1954.

Miss Kelley: If Mr. Mueller's understanding of his question is the same as you have just stated it, Mr. Examiner, I will withdraw my objection.

Exam. Baumgartner: I think that is what you intended to ask.

Mr. Mueller: That is right.

Exam. Baumgartner: What is your answer?

The Witness: Yes, with certain exceptions.

Exam. Baumgartner: Substantially the same with certain exceptions.

By Mr. Mueller:

Q. Well, now, Mr. LaCour, will you state your exceptions.

A. As to the location of the vehicle inspection and as to the distances between the point of inspection and the terminal of L Nelson and/or Gilbertville at Ellington, Conn.

Q. What do you say, first, as to the point of inspection?

A. The inspection took place at the intersection of Route 83 and Turnpike Road in North Somers.

Exam. Baumgartner: What is the number on Turnpike Road?

The Witness: That is the name of the street, sir.

Exam. Baumgärtner: It has no number?
[fol. 1011] The Witness: No number.

By Mr. Mueller:

Q. And the other point was the location.

A. As to the distance from the point of that particular inspection and the terminal of L Nelson and/or Gilbertville at Ellington, Conn. I estimate that distance to be approximately 15 miles. There is one other distance involved in connection with that testimony, and that is the distance between Palmer, Mass. and any portion of Massachusetts and/or Conn. Route 83. It is my contention that no part of the town of Palmer, Mass. is within a radius of 10 miles of Massachusetts and/or Conn. Route 83.

Q. Had you finished your answer?

A. No, I am still working on the exceptions. I have more information than Mr. Shea testified to with respect to the lading.

Miss Kelley: I object to this, Mr. Examiner. It was a general question. The way it was phrased, you would anticipate it was going to be an exception. Now we are going on into, apparently, a long recitation on things that I have no opportunity to object to.

Exam. Baumgärtner: Well, have you any other exceptions other than those that you have already mentioned?

The Witness: Those two things, Mr. Examiner, the exact location, the distances, which I mentioned, and the lading on the vehicle.

[fol. 1012] Exam. Baumgärtner: In addition to those three items, do you have any other exceptions?

The Witness: Well, at this instance, I can't recall of any others. I am trying to recall, as I am testifying, what Mr. Shea said.

Exam. Baumgärtner: Well, Mr. Mueller, you will have to do some inquiring about the lading.

By Mr. Mueller:

Q. Well, now, Mr. LaCour, what do you say about the lading on the vehicle in question?

A. There were three shipments, as I recall it.

Exam. Baumgartner: Now that is this one inspection when the vehicle was where, at Somers?

The Witness: At the intersection of Conn. highway 83 and Turnpike Road in North Somers, Conn. on November 10, 1954.

By Mr. Mueller:

Q. Now will you tell us about the lading.

Miss Kelley: May I see the memorandum Mr. LaCour is using and ask whether it is written.

Exam. Baumgartner: Let the record show that the witness, in beginning his answer, was referring to a document for the purpose of refreshing his memory at that time, is that right, Mr. LaCour?

The Witness: That is correct, sir.

Exam. Baumgartner: And that Miss Kelley has just inspected the document.

By Mr. Mueller:

Q. Mr. LaCour, is the paper you refer to consisting of [fol. 1013] some handwritten notes?

A. It does.

Q. And they were prepared by you and are in your handwriting.

A. They were.

Q. And prepared in conjunction with the incident we are now discussing.

A. At the time and place of the inspection. The lading consisted of a shipment which was described on the pro No. 9685, dated 11/9/54 as one 54-inch face, 14-inch diameter, paper roll for Van Slanderson Embossing Machine. The shipment originated at Patterson, N. J. and was consigned to a consignee at Holyoke, Mass. The shipment weighed 1,000 pounds.

Q. Did the papers you saw indicate the point of receipt of the shipment by Gilbertville?

A. My notes do not reflect that the papers covering this particular shipment indicated the point of interchange. There were two other shipments on this vehicle which I am about to describe. There is another shipment which con-

sisted of 43 pouches of wool mix 253, which weighed 7580 pounds. They were covered by pro No. 10624, dated 11/9/54. It showed the movement of this wool mix from Clifton Heights, N. J. to Pittsfield, Mass. That particular pro about which I am now speaking carried a notation to the effect that the shipment was received from Nelson at Monson, Mass. There was another shipment which consisted of one 50-pound pail of putty. The shipment was [fol. 1014] covered by pro No. 9667, dated 11/9/54. The shipment originated at Brooklyn, N. Y. and was destined to Pittsfield, Mass. This particular pro carried no information as to the interchange point.

Q. Had you finished your answer?

A. My notes do not indicate, but my best recollection of it is that all of these pros were those of Gilbertville Trucking Company.

Q. Where is the point at which this examination was made, Mr. LaCour, as related to Monson, Mass.?

A. You mean the distance?

Q. The distance.

A. Which part of Monson, Mass. are you referring to?

Q. Well, is Monson, Mass. a large community?

A. It is a typical New England-type town.

Q. What would be the nearest distance from the nearest border of Monson, Mass. to the point of this inspection?

A. I would fix it at 12 miles, but I am not at all certain. I would have to measure that.

Q. Did you hear the questions that were put to Mr. Shea, Mr. LaCour, regarding the questions that were put to the driver regarding his usual practices in respect to his route?

A. I did.

Q. And if I asked the same question of you, would you give the same answer?

[fol. 1015] A. Yes, sir.

Q. Have you ever investigated to see whether the L Nelson & Sons Transportation Company or the Gilbertville Trucking Company have a terminal facility of any kind at a point called Monson, Mass.?

A. I have.

Q. Did you find any there?

A. No, sir.

Q. Mr. LaCour, now referring again to your visit, in company with Mr. Shea, to the Ellington, Conn. terminal on November 9, 1954, did you participate in the questioning of Kenneth Nelson about the missing teletype tape?

A. I did.

Miss Kelley: I object.

Mr. Mueller: I merely asked whether he participated.

By Mr. Mueller:

Q. Did you ask him for a file of such records?

A. I did.

Exam. Baumgartner: File of what records?

By Mr. Mueller:

Q. Teletype tapes. What was the result of that request?

A. Mr. Nelson could not or would not produce such records.

Exam. Baumgartner: Now which is it, Mr. LaCour, you said would not or could not; there is a big difference.

The Witness: He didn't produce the records in response [fol. 1016] to our request for them.

* Exam. Baumgartner: He did not?

The Witness: He did not.

Miss Kelley: May we have the previous answer stricken?

Exam. Baumgartner: He has corrected it now.

By Mr. Mueller:

Q. Mr. LaCour, you have heard Mr. Shea's testimony relative to the leasing practices and arrangements for vehicle rentals between Nelson and Gilbertville as ascertained on your joint investigation of November 9 and 10, 1954.

A. Yes.

Q. Can you add anything to what Mr. Shea has told us on that subject?

Miss Kelley: I object, Mr. Examiner, it is such a broad question. It doesn't give any basis for knowing what the witness is expected to testify to.

Exam. Baumgartner: I think that is pretty broad.

Mr. Mueller: I was hoping, Mr. Examiner, I could shorten up some of this procedure.

Exam. Baumgartner: I realize and I appreciate it, but at the same time, we have got to preserve the rights of the parties.

By Mr. Mueller:

Q. At that time, Mr. LaCour, were you told what the compensation arrangement was as between the carriers for the rental of vehicles?

A. I was.

[fol. 1017] Q. And what were you told; if you now remember?

A. That L Nelson & Sons received 60 percent of the revenue and that Gilbertville Trucking Company received 40 percent of the revenue, regardless of the length of the haul by either company, and also regardless of whether the shipment originated over the lines of Gilbertville or of Nelson and also regardless of whether the shipment was prepaid or collect.

Miss Kelley: Mr. Examiner, can I inquire was that with respect to interchange? The question, as I heard it, did not relate to interchange.

Exam. Baumgartner: I thought it did, Miss Kelley.

Miss Kelley: May we have the question?

Exam. Baumgartner: I am sure the answer related to interchange.

Miss Kelley: I don't think it is responsive.

(Question and answer read.)

Exam. Baumgartner: I understood he meant division when he said compensation.

The Witness: I understood that to mean divisions of joint revenues.

Exam. Baumgartner: Told by whom?

The Witness: Kenneth Nelson.

By Mr. Mueller:

Q. And the answer you have given to my question does relate to the division arrangement.

A. Division of joint revenues.

[fol. 1018] Q. Mr. LaCour, have you had occasion, in the course of your twenty-year career with the Interstate Commerce Commission, to obtain a knowledge as to the customary practices in the industry as to the arrangements for divisions between motor carriers?

Miss Kelley: I object, Mr. Examiner.

Exam. Baumgartner: Well, he is just being asked whether or not he has had occasion to learn of the customs and practices of motor carriers with respect to divisions. All he has to do is answer yes or no. There is nothing damaging in that yet. You may answer.

The Witness: Yes.

By Mr. Mueller:

Q. On the basis of that knowledge and experience, I would like to ask you whether you would regard the 60-40 arrangement as an unusual one.

Miss Kelley: I object, Mr. Examiner.

Exam. Baumgartner: He may answer. Even though he may regard it as unusual, that doesn't make it so unusual.

[fol. 1020] The Witness: I would.

By Mr. Mueller:

Q. What have you found to be the customary practice over the area over which you have jurisdiction with respect to divisions of revenue on interline shipments?

Miss Kelley: I object on the same grounds.

Exam. Baumgartner: Well, subject to the objection, you may answer, Mr. LaCour.

The Witness: Customarily, a pro rata basis is used, depending upon the length of the haul and certain other factors.

By Mr. Mueller:

Q. Now, Mr. LaCour, have you heard the testimony on this record that the compensation for vehicles leased be-

tween these carriers was a flat amount ranging from \$15 to \$20 to \$25 per unit?

A. I have.

Q. Now at some time after your visit with Mr. Shea to the Ellington terminal, did you make a visit by yourself to the premises of Nelson's and Gilbertville at Ellington?

A. I did.

Q. Will you recall the date of that visit.

A. November 8, 1955.

Q. Did you at that time discuss rental arrangements for equipment with Mr. Kenneth Nelson or Charles Chilberg or any of the parties?

[fol 1021] A. I did.

Q. Was Mr. Charles Chilberg present?

A. He was.

Q. In that conversation?

A. He was.

Q. Did he speak on the subject?

A. He did.

Q. Will you tell us what he said.

Miss Kelley: Objection.

Exam. Baumgartner: Again he may answer, subject to the objection.

The Witness: Mr. Chilberg stated that the flat fee arrangement had been discontinued and in substitution therefor, a charge of 9 cents per tractor mile was now being made and a charge of 3 cents per semitrailer mile was being made.

By Mr. Mueller:

Q. Was anything said on the subject of leasing straight trucks?

A. I don't recall that any straight trucks were involved in the leases.

Q. Did you inquire into the matter of division on the occasion of your visit on November 8, 1955?

A. What divisions, Mr. Mueller?

Q. Divisions of revenue between Gilbertville and Nelson.

Exam. Baumgartner: On joint traffic?

Mr. Mueller: Interline traffic.

[fol. 1022] The Witness: I think I have already testified as to that.

By Mr. Mueller:

Q. I am now addressing my question to the subsequent visit on November 8, 1955.

A. You are not concerned with the amounts?

Q. No.

A. Yes. At that time I inquired as to the status of the settlement, the divisions between the two companies.

Q. And who was present?

A. Mr. Chilberg and Mr. Nelson.

Q. Can you state whether as of November 8, 1955 there was any money owing from one or the other of these carriers to the other?

A. I can.

Q. Will you please tell us what you learned.

Miss Kelley: I object. I understood Mr. LaCour's answer to be I cannot.

The Witness: I said I can.

Exam. Baumgartner: There is a question pending: you may answer.

The Witness: By examination of the records and through conference with Mr. Chilberg and Mr. Nelson, I ascertained that in round figures Nelson owed Gilbertville \$39,000.

Exam. Baumgartner: As of what date?

The Witness: November 8, 1955.

Exam. Baumgartner: Right up to the date of your inquiry.

[fol. 1023] The Witness: That was my understanding, yes, sir.

By Mr. Mueller:

Q. To clarify the record, when you refer to Mr. Chilberg, do you mean the Mr. Charles Chilberg who is now in the room?

A. Yes, sir.

Q. And the other gentleman was Mr. Kenneth A. H. Nelson.

A: That is correct.

Q. Mr. LaCour, did you at that time, namely November 8, 1955, examine the lease forms being currently used by these carriers in interchanging equipment?

A. I did.

Q. Were you supplied by them with a sample form of lease?

A. Yes, sir.

Q. And have you caused copies of this sample form to be made for introduction as an exhibit here?

A. I have.

Mr. Mueller: Mr. Examiner, I respectfully request that the Agreement, Contract and Lease referred to by Mr. LaCour be marked for identification as Exhibit No. 33.

(Government's Exhibit No. 33, Witness LaCour, was marked for identification.)

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[fol.1028] Direct examination.

By Mr. Mueller:

Q. Mr. LaCour, at the close of your testimony at our last session, I believe we had just had your Exhibit No. 33 marked for identification, and we had been discussing interline settlements between L. Nelson & Sons and Gilbertville, and rentals for equipment.

As I recall, you stated that from an examination of records and questioning of Messrs. Nelson and Chilberg, you found that there were some \$39,000 owing from Nelson to Gilbertville in the way of interline settlements, was that your statement?

A. That's correct.

[fol. 1029] Q. Now, did you also examine the accounts having to do with equipment rentals, and discuss that subject with these gentlemen?

A. I did.

Q. What did you find?

A. That in round figures, Gilbertville owed Nelson \$19,000 for equipment rentals.

Exam. Baumgartner: Is that round figures, or is that exact?

The Witness: That's round figures, sir.

By Mr. Mueller:

Q. Now, what was the source of Exhibit 33?

A. Exhibit 33, being the lease, it was handed to me by Mr. Nelson as a typical illustration of the form of the lease and procedure followed in leasing vehicles.

Q. Will you describe this Exhibit for the record, please, Mr. LaCour?

Take first the first page, please.

A. It is a printed form—

Exam. Baumgartner: Now, just a moment. You think, Mr. Mueller, that this needs explanation, or does it speak for itself?

Mr. Mueller: I think it speaks for itself insofar as Page 1 is concerned, but I thought it might be desirable, Mr. Examiner, to have an explanation of pages 2 and 3 of the [fol. 1030] Exhibit.

Exam. Baumgartner: Very well.

By Mr. Mueller:

Q. The first page is the contract itself, the contract to lease certain described motor equipment, is that so, Mr. LaCour?

A. Yes.

Q. And the document is executed on behalf of Gilbertville by someone.

A. It is.

Q. Would you know who the person is whose signature is there affixed?

A. No, I do not; I cannot make it out.

Q. Would you know who the person is who signed on behalf of Nelson & Sons?

A. One Betty Jane Bergstrom.

Q. Now, what is the second sheet of this Exhibit, Mr. LaCour?

A. It is a report of vehicle inspection.

Q. And that's executed on behalf of which carrier?

A. Gilbertville.

Q. And the first sheet relates to what, to what unit of equipment?

A. The first sheet, or the second sheet?

Q. I beg your pardon, Mr. LaCour, the second sheet of the Exhibit 33, what does it relate to?

A. It relates to an International tractor, 1951.

[fol. 1031] Q. And what does the third sheet relate to?

A. To a Fruehauf semi-trailer, 1954.

Q. And, if you know, whether there are requirements of the Interstate Commerce Commission relating to the execution of such inspection reports?

A. There are.

Q. Now, in the course of your visit on November 8, 1955, Mr. LaCour, did you examine other instruments such as this?

A. Yes, there were countless hundreds of these documents available for inspection.

Q. Did you inquire or investigate the subject of insurance placement on the occasion of your visit of November 8, 1955?

A. I did.

Q. And what did you find?

A. Found that the public liability and property damage insurance coverage for both companies was placed with Liberty Mutual Insurance Company; that is, as of November 8, 1955.

Q. Now, Mr. LaCour, you have heard Mr. Shea's testimony, and the testimony of certain other witnesses concerning the physical layout of the premises at Ellington, Connecticut, on November 9 and 10, 1954.

I would like to inquire whether you observed any changed in that layout in the course of your subsequent visit on November 8, 1955?

[fol. 1033] A. As I entered in the same door which we had used before, I noticed that these changes; (1) that a receptionist had been added, and that the teletype machines had been removed and replaced with a telephone switchboard.

Q. Now, on the occasion of this latter visit, later visit, did you have occasion to discuss the removal of the teletype machine with anyone?

A. Yes, I did.

Q. With whom?

A. Mr. Nelson and Mr. Chilberg, Mr. Kenneth Nelson.

[fol. 1037] . . . By Mr. Mueller:

Q. Do you now recall the question, Mr. LaCour?

A. No, I'm afraid I don't.

Q. Which was the conversation between you and Messrs. [fol. 1038] Kenneth Nelson and Charles Chilberg on the subject of the teletype machines.

Exam. Baumgartner: State the exact language used as nearly as you can, Mr. LaCour. It's difficult to do that, of course, I realize that, but as nearly as you can recall.

The Witness: I was told that—

Miss Kelley: I object, may I, in the manner of the answer in view of your instructions to the witness.

Mr. Mueller: Well, the answer hasn't been given yet, I submit, Mr. Examiner.

Exam. Baumgartner: Well, I want to ask this question.

Was this statement about the teletype volunteered to you, or did you make an inquiry?

The Witness: I made an inquiry.

Exam. Baumgartner: What was the inquiry?

The Witness: Why telephone service had been substituted.

Exam. Baumgartner: To whom was this inquiry addressed?

The Witness: Messrs. Chilberg and Nelson.

Exam. Baumgartner: Mr. Charles Chilberg and—

The Witness: And Kenneth Nelson.

Exam. Baumgartner: Were they together?

The Witness: They were.

Exam. Baumgartner: And you addressed the question to both of them?

The Witness: I did.

[fol. 1039] Exam. Baumgartner: All right, you may proceed now.

What were you told as nearly as you can remember, and by whom were you told?

The Witness: I was told by Mr. Kenneth Nelson in the presence of Mr. Charles Chilberg that direct telephone service had been substituted for the teletype service previously used because teletype service was found to be very slow and required the use of a skilled operator.

By Mr. Mueller:

Q. Was there any other conversation on the subject?

A. Not that I recall.

Q. Was anything said on the subject of thwarting an investigation?

Miss Kelley: Well, the witness may answer subject to your objection.

The Witness: Yes; Mr. Kenneth Nelson said that he had heard a rumor to the effect that one of our employees—

By Mr. Mueller:

Q. By "our" you mean the Commission?

A. That's right, sir.

—had been thwarted in another case when attempting to obtain evidence in the form of teletype messages, and that he had been thwarted because the person, not named, had destroyed the teletype messages.

Exam. Baumgartner: Was it this said statement that you entered into conversation with him about the substitution of telephone service for teletype service?

The Witness: It was, sir.

Exam. Baumgartner: Why was that statement made?

The Witness: I haven't any idea; it was volunteered by Mr. Nelson.

Exam. Baumgartner: All right, proceed, Mr. Mueller.

By Mr. Mueller:

Q. Did you discuss the subject of operations to and from points in Massachusetts, west of the Connecticut River, with Mr. Chilberg and Mr. Kenneth Nelson on the occasion of your November 8, 1955, visit?

A. Yes, I did.

Q. Do you recall such a conversation?

A. Yes, I do.

Q. And can you now tell us the conversation?

A. Mr. Chilberg stated in response to our discussion concerning movements between points in western Massachusetts and the Philadelphia area, that he had a shipper whose domicile to the Philadelphia area which moved considerable traffic over his line, and that that shipper then wanted service to points in Massachusetts west of the Connecticut River, and that that could be served only through interchange with Gilbertville after it had acquired the Wolf Certificate.

Q. Now, Mr. LaCour, were you involved in road checks conducted by Commission personnel and others on May 2, 1956, at Union, Connecticut?

[fol. 1041] A. Yes, sir.

Q. Was Mr. Shea also at that check?

A. Yes, sir.

Q. And in the course of that road check, did you have occasion to examine vehicles of either of the principals to this proceeding?

A. Yes, sir.

Q. And in connection with that check, did you also, did you prepare a report?

A. I did.

Q. And did you also obtain certain documentary evidence such as pros?

A. I did.

Q. Mr. LaCour, I'll hand you a sheet of, a sheaf, of papers which we will ask to have marked for identification as Exhibit No. 34.

Miss Kelley: Mr. Examiner, the method of offering these exhibits all as one number raises a question in my mind in that when the various exhibits are offered, I may have objections to one of these papers and not object to certain of the other papers that make up this exhibit; and I wonder if it isn't going to cause complication and difficulty on the record.

Exam. Baumgartner: I doubt it, Miss Kelley, because

when we come to that point, if you object to Sheet No. 4 of Exhibit 34, why, I think it will be plain enough on the [fol. 1042] record; and if it's excluded, why, the record will show that Sheet No. 4, and so on, was to be excluded.

Miss Kelley: I just thought it would be advisable to bring it up at this time.

Exam. Baumgartner: Now, there are a group of documents consisting of 6 sheets, 2 of them being pros of Gilbertville Trucking Company, 3 sheets pertaining,—

Miss Kelley: You're in error in your last statement, Mr. Examiner; one being a pro of Gilbertville Trucking and one of Nelson & Sons.

Exam. Baumgartner: I'm sorry. One being a pro of Gilbertville Trucking, and one Nelson Company; and the next 3 sheets of the exhibit constitute one document, being a Driver-Equipment Compliance Check report on form, what is it?

The Witness: SS31.

Exam. Baumgartner: And the last sheet being apparently an agreement, contract and lease, so entitled, will be marked as Exhibit 34 for identification.

(Commission's Exhibit No. 34, Witness LaCour, marked for identification.)

By Mr. Mueller:

Q. Now, Mr. LaCour, will you describe first that part of Exhibit No. 34 which is designated as Driver-Equipment Compliance Check.

A. This is a printed form numbered SS 31 by the Interstate Commerce Commission.

[fol. 1043] Q. And were the entries thereon made at the time of inspection of the vehicle described on the form?

A. Yes, sir.

Q. Now, what was the date of the instrument?

A. May 2, 1956.

Q. And does it show the time?

A. It does, 11:00 a.m.

Q. And does it describe the vehicle?

Exam. Baumgartner: Well, at Union, Connecticut?

Mr. Mueller: Yes.

By Mr. Mueller:

Q. Does it describe the place of inspection?

A. Route 15, Union, Connecticut.

Q. And does it show the name of the carrier?

A. It does.

Q. And does it describe the vehicle further?

A. It does.

Q. Now, what type of tractor was it?

A. An International tractor, and Strick semi-trailer.

Q. And does it show the name of the driver?

A. It does.

Q. And does it show the name of the date of his doctor's certificate?

A. It does, 12/12/53.

Q. Would that entry indicate that you saw the doctor's certificate at that time that the driver exhibited it to you? [fol. 1044] A. It does.

Q. Now, I notice certain check marks down through the items having to do with the various phases of the condition of the equipment.

Is there any criticism?

A. The check marks indicate there were no defects. The "X C" under Service (Foot) Brake indicates it was not checked.

Q. And does the instrument contain the signature of the driver?

A. It does.

Q. And what does that signature of the driver on the instrument signify?

A. Acknowledges receipt of a copy of this form.

Q. And will you describe just how these forms are made out?

A. It's a four-part form.

Q. And made with the use of carbon paper?

A. That's right, sir.

Q. And so, in effect, each copy is a duplicate?

A. Identical.

Q. Now, I note an entry on the SS 31 form and the words "See Notes."

A. Yes, sir.

Q. Did you examine the billing in the possession of the driver in connection with your inspection of the vehicle?

Miss Kelley: I object; can we have an explanation of [fol. 1045] the "See Notes"?

Mr. Mueller: This is preliminary, if you please, Miss Kelley.

Exam. Baumgartner: You'll connect it up, will you, please.

Mr. Mueller: Yes, indeed.

Exam. Baumgartner: All right.

By Mr. Mueller:

Q. Did you also examine the load, that is, the shipment on the vehicle?

A. My answer is yes to both questions.

Q. And to what does your entry "See Notes" refer?

A. That, to me, indicates that I made notes in connection with my inspection of the lading on the vehicle at the time.

Q. Now, can you tell us what you found in respect to the lading and the load, please?

A. I can. These are original notes made at the time and place of the inspection.

The International tractor owned by L. Nelson & Sons was then and there under lease to Gilbertville Trucking Company. There was an identification device attached to both sides of the vehicle, indicating the operator of the vehicle, then and there to be Gilbertville Trucking Company; the device was not numbered; that is to say, the identification device was not numbered.

Exam. Baumgartner: What numbers should have been on there?

The Witness: There are certain regulations which require [fol. 1046] the numbering of identification devices.

Miss Kelley: I'm sorry, I don't follow you. Can you explain that a little more?

The Witness: Leasing regulations require the numbering of identification devices.

Miss Kelley: Like, is that the same like a tractor in a fleet, that each tractor should have a number.

The Witness: No, the device itself should have been serially numbered.

Miss Kelley: I never heard of it before.

Exam. Baumgartner: That is to say, whose name should have been on there?

The Witness: Gilbertville's numbers assigned to identification devices.

Miss Kelley: That is to the placard, that's—

By Mr. Mueller:

Q. You are not referring to the docket number of Gilbertville, of course.

A. No, sir.

Q. This is a serial number that the carrier is required to use in connection with its use of such,

A. Identification devices.

Miss Kelley: What do you call by identification devices, are you referring to the placards that the carriers place on the sides of the doors of each tractor when they lease equipment?

[fol. 1047] The Witness: Yes, I am.

Miss Kelley: To identify it; and those are supposed to have a number, you say?

The Witness: Yes.

Mr. Mueller: May I interject.

By Mr. Mueller:

Q. Was this device wooden, metal, or plastic?

A. It was a plastic device.

Q. Will you proceed, Mr. LaCour.

A. The vehicle, the unit, consisted of an International tractor, bearing L. Nelson Company No. 133, bore Connecticut registration plates No. A-88488. The semi-trailer was a Strick trailer, and it bore Connecticut registration plate T-2298. The vehicle is driven by driver Charles Botti; the lading aboard the vehicle consisted of two shipments. One shipment was covered by an L. Nelson pro N 4822, dated 5/1/56. The shipment originated in Nutley, New Jersey, was consigned to Boston, Massachusetts, and the ship-

ment consisted of 22 bags greased wool, weighing 3,641 pounds.

The other shipment aboard, then and there aboard the vehicle was covered by Gilbertville's pro 58446 A, dated 5/1/56. This shipment originated in New York City, and was consigned to Saxonville, S-a-x-o-n-v-i-l-l-e, Massachusetts; and this shipment consisted of 66 bales greasy wool—no weight was shown on this latter pro.

[fol. 1048] Q. Have you finished?

A. That's all.

Q. Is the first sheet of Exhibit 34 the pro covering the Gilbertville shipment that you have just described?

A. It is.

Q. And is the second sheet of the Exhibit the pro for the L. Nelson & Sons shipment you have described?

A. It is.

Q. And now, will you take up, Mr. LaCour, Sheets 4, 5, and 6 of this Exhibit and describe them for the record?

A. Sheet No. 4 in this particular group is the report of the vehicle inspection, titled "Report of Vehicle Inspection," and it indicates—

Exam. Baumgartner: Will you give the number of the form, please.

The Witness: It's ATA Form No. LVI-1.

Exam. Baumgartner: LVI-1.

The Witness: It may be LVI-1.

This particular document is dated May 2, 1956.

By Mr. Mueller:

Q. Does it cover a part of the equipment which you have described on your Driver-Equipment Compliance Check form?

A. It does.

Q. What portion of the equipment?

A. It covers brakes,—

[fol. 1049] Q. Does it cover the tractor, or the trailer, Mr. LaCour?

A. This covers the semi-trailer.

Just a minute. This covers vehicle bearing company No. 133, which is the International tractor.

Q. And what portion of the equipment is covered by Sheet 5 of the Exhibit No. 34?

A. That covers the semi-trailer.

Exam. Baumgartner: They both cover the same trailer?

The Witness: No, sir; the Sheet No. 4 covers the tractor. You'll note that under "Make," it says 133.

Exam. Baumgartner: Yes.

The Witness: You'll recall that I testified the tractor bore company No. 133.

Exam. Baumgartner: Yes.

By Mr. Mueller:

Q. And does the fifth sheet of the Exhibit cover the trailer?

A. Covers the semi-trailer.

Q. T-143?

A. It does, sir.

Q. And the sixth sheet of the Exhibit is what?

A. Is the Agreement, Contract and Lease entered into.

Q. And does it cover the 2 units of equipment which you have previously described?

A. It does.

Q. And what does the instrument indicate the date and [fol. 1050] time of its execution?

A. Yes, it does.

Q. Will you state it?

A. The time is shown as 9:00, it doesn't indicate whether it's a.m. or p.m.; yes, I believe it does. It would indicate that this agreement was executed at let's see, 9:00 a.m., on May 2, 1956.

Exam. Baumgartner: Where do you find that, Mr. LaCour?

The Witness: Under Item 2, following the words, or word, "Witnesseth."

By Mr. Mueller:

Q. Will you read Item 2?

A. "The date of the end of this Agreement shall be;"—
Wait a minute, now; I'm wrong.

Q. Do you wish to correct your statement, Mr. LaCour?

A. I do. The time and date of the beginning of this agreement shall be 8:30 a.m., May 2, 1956; and the date of the end of the agreement shall be 9:00 p.m., May 2, 1956.

Q. And does the instrument contain certain signatures?

A. It does.

Q. Purporting to be on behalf of Gilbertville and L. Nelson & Sons?

A. It does.

[fol. 1064] Cross examination.

By Miss Kelley:

Q. Mr. LaCour, you stated that your territory, that you have a limited territory that comes under your jurisdiction, is that correct?

A. My territory is located in Massachusetts; and consists of that part of Massachusetts on and west of Massachusetts Highway 12.

Q. Now, is the terminal at Gilbertville, Massachusetts, within your territory?

A. Yes, ma'am.

Q. And is it by virtue of that location and the Gilbertville Trucking Company's address at that location as their [fol. 1065] principal address the reason that that company comes under your jurisdiction?

A. It is.

Q. Now, is it correct that the L. Nelson & Sons Company, by virtue of its principal location in Connecticut, is outside of your jurisdiction, and does come under the jurisdiction of the Hartford office of the Interstate Commerce Commission, which is attached to the New York, or District 2, office?

A. I'm afraid I don't understand the question.

Mr. Mueller: Mr. Examiner, I don't get the relevancy of these questions.

Exam. Baumgartner: I think I'll permit the witness to answer.

By Miss Kelley:

Q. You recognize that L. Nelson & Sons is a Connecticut corporation?

A. Yes, I do.

Q. And its principal location is at Ellington, Connecticut?

A. It is.

Q. What district office of the Commission has jurisdiction over Ellington, Connecticut, and carriers domicile at that point?

A. The New York, New York, District Office.

Q. Now, in connection with your investigation, did you check the records of the Commission at their Hartford, Connecticut, office with respect to the location of Gilbertville Trucking Company's records at Ellington, Connecticut?

Mr. Mueller: Mr. Examiner, I'm confused.

Exam. Baumgartner: Well, she's just asking if he checked the records.

Mr. Mueller: With respect to the Gilbertville Trucking Company in Hartford?

Miss Kelley: Yes.

Exam. Baumgartner: Yes; whether or not he had checked the records at the Hartford, Connecticut, office of the I.C.C. with respect to the location of the Gilbertville Trucking Company's records at Ellington.

Mr. Mueller: I withdraw the objection.

The Witness: As I understand it, you want to know if I examined some records regarding Gilbertville at the Hartford, Connecticut, office.

By Miss Kelley:

Q. Yes.

A. No, I did not.

Q. Did you check with Mr. Noble, or Mr. Edmunds, attached to the Hartford, Connecticut, office to learn whether or not they had made visits upon the Gilbertville Trucking Company at Ellington, Connecticut?

[fol. 1067] The Witness: No.

By Miss Kelley:

Q. Did you make a check of the Commission's files with respect to notices or letters addressed to the Commission by the Gilbertville Trucking Company?

A. I did.

Q. And do you recall that a letter was addressed to, or that you found that a letter was addressed to the Commission early in 1954 with respect to the removal of certain records from Gilbertville to Ellington, Connecticut?

A. I do recall a letter; I'm not certain of the date.

[fol. 1068] Q. Mr. LaCour, didn't you have that letter with you on your first visit to Ellington, Connecticut, and showed it to Kenneth Nelson?

A. It could be; I don't recall it, but it's possible I may have.

Q. Do you recall that the letter did not, rather, that the letter did notify the Commission that some records were to be changed from Gilbertville, Massachusetts, to Ellington, Connecticut?

A. Yes, Ma'am, I know that.

Q. Do you recall the date of that letter?

A. I'm sorry, I don't; but I did know.

Q. Was it early in 1954?

A. I do know that, I'll answer this way; I do know that Gilbertville has received permission to maintain its records at Ellington; if that's what you're looking for.

Q. Yes.

A. That's right.

Q. Well, was the permission from the Commission in the form of a letter directed to—

A. My information came in the form of a notice that's provided us by the Commission, where a carrier domicile to one territory or district has received permission to maintain its records in another district.

Q. And that notice had been issued prior to your first visit?

[fol. 1069] A. That, I can't recall; I know they now have such authority.

Q. But the letter was at least written prior to your visit?

Mr. Mueller: Mr. Examiner, I submit that she's arguing with the witness; the letter would be the best evidence.

The Witness: I cannot honestly recall the date of the letter.

By Miss Kelley:

Q. Can you produce the letter, Mr. LaCour?

A. No, that would be in the Commission's files in Washington.

[fol. 1071] By Miss Kelley:

Q. Now, on your first visit to Ellington, Connecticut, on November 9, 1954, that you said you checked the payroll records with respect to people working during the same pay period for both Nelson and Gilbertville?

A. Yes, Ma'am.

Q. I mean, your testimony is you actually checked the payroll records of the 2 companies?

A. We did.

Q. Now, can you give us the names of any individuals, their job classifications, and the date on which they worked for L. Nelson & Sons, and that you claim during this same period they worked for the Gilbertville Trucking Company?

A. No, I cannot.

[fol. 1072] Q. Now, can you give us the name, job classification, and date on which you claim any employee worked part of the day for the Nelson Company, and part of the day for the Gilbertville Trucking Company that you found on the payroll records on that day?

A. I think, Miss Kelley, you're confused. As I recall my testimony in that respect, I said that Messrs. Chilberg and Nelson told us that; and that the records so indicated, as I recall my testimony.

Q. Now, if I recall your testimony, you said that Mr. Chilberg was not present on your first visit on November 9 of 1954, didn't you say he was not present?

A. I haven't said so.

Q. Well, on your first visit, you were accompanied by Mr. Shea?

A. That is right.

Q. November 9, 1954?

A. That's right.

Q. Now, do you recollect whether Mr. Charles Chilberg was at Ellington, Connecticut, on that day?

A. No, he was not.

Q. So that your position is that you did not check the payroll records, or that you did check them?

A. No; we did examine them.

Q. But, in your examination, or as a result of the ex-[fol. 1073] amination you could not give me the names of any persons?

A. No, we made comparisons of names appearing on both payrolls, found the same persons on both payrolls.

Q. But, you cannot give me dates or times?

A. No, I cannot.

Q. Or the name of any person?

A. No, I cannot.

Q. Now, how many medical certificates for drivers were presented for you for examination by the Gilbertville Trucking Company?

A. I've forgotten the exact number, but for round figures, 55 or 60.

Q. Now, did you check to learn if drivers whose medical certificates were contained in that list were shown to have worked for other trucking companies than the L. Nelson & Sons, such as Adley, or Associated, or Dunley and Perkins?

A. No, I did not.

[fol. 1076]

By Miss Kelley:

Q. Mr. LaCour, you testified with respect to inspecting a vehicle at Somers, Connecticut, on the morning of November 10, 1954.

A. I did.

Q. Did you actually copy the pros that were on the vehicle, or were the notes from which you testified merely memorandums as to the information on the pros?

A. These notes were made from the information on the pros.

Q. But at this time you cannot say whether you copied all of the information on the pros or not, is that correct?

A. No, I certainly didn't because it's a printed form, and I was not concerned with much of the printed matter on the form.

Q. When did you visit Monson, Mass., to check the location of the trailer testified to be stationed at Monson by Gilbertville?

A. I have visited Monson, Massachusetts, on various and diverse occasions, sometimes in the course of other duties, and other times specifically for the purpose of attempting to locate a terminal owned or operated by Gilbertville Trucking Company.

Q. You do know that there is no terminal owned or operated by Gilbertville at Monson?

A. I was unable to find any building devoted to that purpose.

Q. Well, have you checked for the location of the trailer [fol. 1077] which is stationed at Monson, Mass.?

A. I have, yes.

Q. And when did you attempt to locate that trailer?

A. I have looked for anything, not only trailers, but buildings as well; I have never been able to locate any.

Q. Have you checked since testimony was offered in this hearing as to the point where the trailer has been stationed on the vacant lot?

A. No, I have not.

Q. In your previous visits to Monson, do you recollect whether or not you recognized the vacant lot that was described in this proceeding as the point where the interchange has taken place in Monson?

A. I don't recall that there was any testimony as to the exact location of the semi-trailer.

Q. After the hearing, I believe it was not a street address, but do you recall that after the hearing we made a check as to a street address, and I found, and I believe informed you, that it was Cushman Street in Monson?

A. The last I knew on that subject, Miss Kelley, was that

a check was to be made; the result of the check, I haven't been advised of.

Q. You recall a Monday morning of this week when in the corridor that we were discussing it, and asked about that name, the same name as the baking company around [fol. 1078] here, mentioned, and then it was remembered that it was Cushman Street?

A. I do recall we had some informal discussion; and if my memory serves me correctly, a check was to be made as to the exact location; but as I said before, I haven't been advised as to the result of the check.

Q. Mr. LaCour, have you made a check of the divisions of revenue between southern carriers such as Super Service Motor Freight Lines, Griggs, Mason-Dixon Lines, and other long-haul carriers who interline freight with New England carriers?

A. No, I'd have no occasion to make such a check.

Q. Well, in your checking of the New England carriers in your area who interline with such southern carriers, you do not recall having made a check?

A. No, I do not.

Q. Do you know that it's a matter of common knowledge in the trucking industry that particularly the southern carriers have a flat-rate arrangement with New England carriers for interline, regardless of what area the New England carriers serve?

A. No, I do not.

Exam. Baumgartner: What do I understand that term "flat-rate," you mean a fixed rate?

Miss Kelley: Fixed division.

Exam Baumgartner: Your answer?

The Witness: With that understanding.

[fol. 1079] By Miss Kelley:

Q. Now, have you checked the division arrangement between motor carriers and carriers whose authority issued by the Massachusetts Department of Public Utilities has been registered with the Interstate Commerce Commission?

A. I'm afraid I don't understand the question, Miss Kelley.

Q. Well, do you recognize that in your area, and throughout Massachusetts, there are a number of carriers who hold authority from the Massachusetts Department of Public Utilities which has been registered with the Interstate Commerce Commission to permit those carriers to handle freight in interstate; that is, moving in interstate commerce, but physically within Massachusetts?

A. Yes, I understand that.

Q. Now, have you checked the interline arrangements of such carriers with interstate or multiple-state carriers?

A. Yes.

Q. Isn't it a fact that in numerous instances, such Massachusetts, physically intrastate carriers, all on unregistered certificates, do have fixed—

Exam. Baumgartner: Interline division.

Miss Kelley: Thank you, Mr. Examiner.

The Witness: Fixed with respect to each individual point served by the carrier.

By Miss Kelley:

Q. Didn't you find in a number of such carriers operate on a fixed rate per 100 pounds for the particular area that [fol. 1080] they serve?

For example, in the Worcester area, that they would get so much per hundred pounds for all freight interlined with the multiple-state carriers?

A. Oh yes.

Q. And that's regardless, it covers all areas.

A. Small areas.

Q. Mr. LaCour, with reference to the settlement account between Nelson and Gilbertville, I believe you said that you made that check in your visit in November of 1955 to Ellington, Connecticut.

A. That's correct.

Q. Did you actually check the bookkeeping records of the company?

A. No,—

Q. Well,—

Mr. Mueller: Had you finished your answer, Mr. LaCour?

The Witness: I believe, if I may clarify that answer.

Exam. Baumgartner: The answer you want to explain, you may do so.

The Witness: I didn't check each and every item involving these particular accounts, since that information was prepared at the direction of, I have forgotten whether it was Mr. Chilberg or Mr. Nelson; I believe it was Mr. Nelson.

By Miss Kelley:

Q. Well, do you know from which company's records the [fol. 1081] figures that you gave here were given to you?

A. The Nelson records. Pardon me; the Gilbertville records.

Q. From the Gilbertville records?

A. Yes.

Q. You made no comparison, then, as to the figures on each company's books, or as to whether or not the postings in each company's books were up to date or covered the same period?

A. My understanding at that time was that the figures provided were as of that date, November 8, 1955.

Exam. Baumgartner: You're speaking now about what the records show with respect to obligations due and owing by Gilbertville to Nelson & Sons Company?

The Witness: No, the reverse, Mr. Examiner; due and owing Gilbertville by Nelson. This figure, I believe, is \$39,000 in round figures, is that the one you're referring to?

Miss Kelley: Wait a minute. You had Nelson to Gilbertville.

Exam. Baumgartner: That's right.

By Miss Kelley:

Q. And then this morning, you gave Gilbertville owed Nelson.

A. But this morning I was testifying about vehicle rentals.

Exam. Baumgartner: Yes, well, that's what we're trying to find out now.

The Witness: Are you discussing vehicle rentals, or division of interline charges?

[fol. 1082] By Miss Kelley:

Q. Well, frankly, Mr. LaCour, what I'm trying to find out is what you were referring to in your testimony; and I thought that you were discussing the entire account between the two companies, both interline and other matters.

A. No. If my memory serves me correctly, yesterday I testified that Nelson owed Gilbertville \$39,000, in round figures, on interline settlements; and this morning I testified that Gilbertville owed Nelson \$19,000 in vehicle rentals.

If I didn't so testify, I want to do so now.

Q. And those were the only items that you were testifying to, is that correct?

A. That's correct, nothing else.

Q. And although there may have been other matters for adjustment between the two companies, you didn't cover the complete account between the two companies?

A. Oh, no.

Q. And you got your information from a check that was made by somebody else?

A. That's right.

Q. You did not actually take these figures from the books?

A. I didn't physically make the computations; I examined some of the records to ascertain from whence the figures came, and then the net results were prepared and provided to me by Mr. Nelson.

[fol. 1083] Exam. Baumgartner: Mr. Kenneth Nelson?
The Witness: Kenneth H. Nelson.

By Miss Kelley:

Q. Now, on your visit to Ellington, Connecticut, on November 8, 1955, isn't it a fact, Mr. LaCour, that you stayed downstairs in a room that's commonly known or called the drivers' room?

A. You mean throughout my entire visit?

Q. Through your visit, weren't you in that room most of the time?

Mr. Mueller: On which day?

By Miss Kelley:

Q. On November 8, 1955?

A. I really don't recall. I can safely say that most of the time was spent on the lower floor; part of it in the drivers' room, part of it in what I recognized to be Mr. Chilberg's office.

Q. Well, let me say that I didn't mean to tie you down in one spot.

Now, on that occasion, you did not go upstairs in the office of the Gilbertville Trucking Company, did you?

A. I don't recall; well, I may have.

Q. Well, if you did go up, will you tell us if changes had been made in the Gilbertville office on the second floor, or during the interim between your first visit of November, 1954, and your second visit in November of 1955?

A. I don't recall any physical changes.

[fol. 1084] Q. Do you recall whether or not you went upstairs to see?

A. I really don't.

Exam. Baumgartner: I think he's already said that.

By Miss Kelley:

Q. Was this the first investigation that you have made of the Gilbertville Trucking Company since March of 1953, which I believe is the date that the stock of the company was purchased from Mr. Vachon?

A. Depends on what you call an investigation.

Q. Well, had you had any, or had you made a terminal check of the Gilbertville Trucking Company during the interim period?

A. I really don't recall; I make hundreds of them; and I can't recall that I did or not.

Q. But, I mean, you did know Mr. Vachon had sold the stock in the Gilbertville Trucking Company to Kenneth Nelson?

A. I had heard it, yes.

Q. Now, Mr. LaCour, you have testified that you participated in a road check at Union, Connecticut, which I be-

lieve extended for a three-day period on May 2, 1956, to the 3rd and 4th?

A. I don't remember the exact dates, but we did have a three-day road check at Union, Connecticut, and May 2, 1956, was one of the days.

Q. Now, do you recall that you participated in the road check of several vehicles of L. Nelson & Sons Company during that road check?

A. I was present at the road check. Just exactly whose [fol. 1085] vehicles I inspected, I haven't the remotest idea at the moment.

Q. Well, I show you an SS 31 Form, which is the report form of the Bureau of Motor Carriers, is that correct?

A. Yes.

Q. And do you recognize where the signature on the bottom after the words "Inspected by," do you recognize that as your signature?

A. I do.

Exam. Baumgartner: Recognize it as what?

Miss Kelley: He recognized the words after "Inspected by" as his signature.

By Miss Kelley:

Q. And, Mr. LaCour, did that cover the inspection of a vehicle of the L. Nelson & Sons Company, being International tractor No. 103, I presume that's a company number, and Brown trailer No. T95, and the driver's name was George Smith?

A. It does.

Q. Now, is there any criticism of the lading carried on that vehicle by you, Mr. LaCour, as shown by the copy of the SS 31 Form which I have shown you?

A. No, there is not.

Exam. Baumgartner: Miss Kelley, are you going to ask the same question about each one of those?

Miss Kelley: There's only 4, I think.

[fol. 1086] Exam. Baumgartner: I thought maybe you could lump them all and ask him one question.

Miss Kelley: All right.

By Miss Kelley:

Q. Now, there are, I believe, 3 other SS 31 Forms that have your signature on them, Mr. LaCour, showing inspection of vehicles of the L. Nelson & Sons Company on May 2, 1956; would you look at each of these, the SS 31 reports, and tell me if there was any criticism of the lading carried on the vehicles at the time of your inspection?

A. What is the Company number of the tractor in this one?

Q. I can't read it; looks like 21, or 131.

A. There's no criticism of the lading in connection with this particular SS 31.

Exam. Baumgartner: How about any of the rest of them; she's asking you a lump question there so as to speed things up.

By Miss Kelley:

Q. On one of these inspection reports is shown as being, the date is 5/4/56.

A. There's no criticism of the lading on this particular SS Form 31.

Q. That was a separate truck of the L. Nelson Company which you inspected.

And there is a third SS 31 report for 5/4/56 in which is shown you inspected the vehicle.

A. Matches the same with respect to this.

Q. There's no criticism with respect to the lading carried [fol. 1087] on the vehicle?

A. None.

Q. Now, Mr. LaCour, on May 2, 1956, you have testified as to stopping one vehicle of the Gilbertville Trucking Company driven by driver Botti.

Did you inspect another vehicle of the Gilbertville Trucking Company operated by driver Pierce on that day?

A. Yes.

Q. And there was a vehicle of Gilbertville Trucking Company inspected at 9:05 a.m. on May 2, '56, and your SS 31 report shows no criticism of the lading carried on that vehicle, is that right?

A. It does not.

Exam. Baumgartner: You mean it does not show—

The Witness: It does not show on the SS 31.

Exam. Baumgartner: —that there was any criticism?

The Witness: That there was any criticism of the lading at that time.

By Miss Kelley:

Q. Now, on your SS 31 report in connection with the vehicle operated by driver Botti, which is shown on Exhibit 34 for identification, does the Exhibit show that the driver's log was in order?

A. It does.

Q. And you took a copy of the driver's log, didn't you, Mr. LaCour?

[fol. 1088] A. Driver Botti made a copy for me and handed it to me.

Q. And do you recollect that that log showed that driver Botti had at least been off duty from Midnight on May 2 to 8:00 a.m. on May 2?

A. I don't recall; I don't have it before me.

If it will help, Miss Kelley, there was no criticism of the driver's log.

Q. I wanted to ask a few more questions on it, if you'll bear with me just a moment.

Do you recognize that as a copy of driver Botti's driver's log which he gave to you on that occasion?

A. I believe, yes, I do; it's a copy.

Q. Now, does that show that driver Botti had been off duty from midnight to 8:00 a.m.?

A. Yes, it does.

Q. And that he reported on duty, but was not driving from 8:00 a.m. to approximately 9:30, or is that definitely 9:30? I have difficulty reading these logs.

A. It's approximately 9:30.

Q. And then it shows he was driving from 9:30 to 10:00?

A. That's correct.

Q. So that he had been driving approximately a half-hour; does the 10:00 o'clock signify the time that he was stopped for the road check at Union, Connecticut?

A. Not necessarily.

[fol. 1089] Q. Did you hear the testimony of Mr. Shea that a number of people had participated in the road check?

A. I did.

Q. And the trucks were stopped various periods of time, and that all trucks coming down the road were stopped?

A. That's correct.

Q. So that you did have a long line of trucks stopped in the road on that location at various times during the day?

A. We didn't stop any trucks.

Q. But there were a long line of trucks stopped on that particular day for inspection; as I understand it, the police pulled the trucks into line, but all trucks coming along the road were held to be inspected, is that correct?

A. They were detoured into a large lot that's adjacent to the weighing station; they were not on the public way.

Q. Now, driver Botti, his vehicle was inspected at 11:00 a.m., is that correct?

A. That's correct. That's approximately eleven; that's not intended to be the exact moment at which the inspection occurred.

Q. Well, it was approximately at 11:00 a.m.

A. It may have been 10:30, 11:00, or 11:15.

Q. Now, you inspected his vehicle; and I believe you already testified that you found nothing wrong with the vehicle, that it was completely in order.

[fol. 1090] A. Yes, I found no defects on the vehicle whatsoever.

Q. Now, after stopping driver Botti, what did you do?

A. I asked for the shipping papers of the company, the lading.

Q. I'm sorry, I didn't mean that.

I realized that you did that, and I think it's clear on the record; but did you call them back to Ellington, Connecticut, or have someone call on your behalf?

A. No, I did not.

Q. On that morning, do you recall that someone made a call to Ellington, Connecticut, and advised that vehicles were being held, and wanted someone from Ellington, Connecticut, to come to Union, Connecticut?

A. I was informed that such a call was placed.

Q. Do you know who made the call?

A. I do not.

Q. Did you learn on that day that Mr. Chilberg was out of town, New York, or some other place?

A. The information I received indicated that neither Mr. Chilberg or Mr. Nelson was available, but that the day foreman would appear.

Q. And the day foreman did appear?

A. Someone did appear, that's correct.

Q. And do you recall what time he appeared?

A. My best recollection is sometime after noontime.

[fol. 1091] Mr. Mueller: Mr. Examiner, I apprehend that Miss Kelley is not getting into the realm of her motion.

Miss Kelley: No, sir, I am not; I'm saving that until later.

Exam. Baumgartner: Just a moment, Miss Kelley; I don't know—

Miss Kelley: I'll be frank, what I want to know, Mr. Examiner, is how long these trucks were held on that road.

Exam. Baumgartner: Why don't you ask the question; put it simply and straight.

By Miss Kelley:

Q. When was Mr. Botti's truck released?

A. I haven't the slightest idea; I had nobody retaining them or detaining them at the place.

Q. But a man did appear from Nelson's office; do you recall the name of the gentleman?

A. Unfortunately, I don't; my best recollection of him was that he was quite a sizable man; what I would determine a big man.

Q. Do you recall that he got there after you returned from lunch on that day?

A. It could well be, I don't know.

Q. Did you direct that freight on Mr. Botti's vehicle be unloaded?

A. Oh, no, no; we have no jurisdiction over that; we cannot order anybody to do any such thing.

[fol. 1092] Q. In your investigation of this matter, did you learn that definite instructions had been given by the

officials of L. Nelson or Gilbertville with reference to not transporting freight of each company in the same vehicle?

A. No; neither of the representatives of the company appeared that day.

Q. Mr. Kerr, or the day foreman, as you call him, did appear, didn't he?

A. Yes.

Q. Do you recall his statement that he had been away from the terminal, and that it was definitely a boner on somebody's part, contrary to his instructions, and instructions of the officials of the company?

A. I don't recall any such statement, Miss Kelley.

Q. Now, on the Botti vehicle, you found wool, is that correct?

A. That's correct.

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[fol. 1098] By Miss Kelley:

Q. Since May 2 of 1956, have you inspected other vehicles of the L. Nelson & Sons Company in a road check?

A. Could be.

Q. Do you recall any?

A. Not particularly, no.

Q. And prior to May 2, 1956, do you recall having checked vehicles of L. Nelson & Sons Company in a road check?

A. I might have; I don't know.

[fol. 1099] Q. And now, with respect to the Gilbertville Trucking Company?

A. Same answers.

Q. Did you participate in the 2 inspections which Mr. Shea had testified to?

A. Not in the inspection of the vehicle itself.

Q. Pardon me?

A. Not with respect to the inspection of the vehicle itself.

Q. Well, as to the fishline and the cotton piece goods that were criticized, did you participate at all with respect to those 2 small shipments?

A. May I see the exhibit?

Mr. Mueller: Would you give the Reporter the Exhibit number?

Miss Kelley: Referring to Exhibit 30 and Exhibit 32, are 2 cartons, cotton piece goods, 158 pounds.

The Witness: Your question was what?

By Miss Kelley:

Q. I asked you if you are familiar at all with these, let me follow it up and say, do you know that they were removed from the respective trucks at Union, Connecticut?

A. I haven't the slightest idea.

Q. Now, Mr. LaCour, do you recall, in your visits to Ellington, Connecticut, in November of 1954 that you were requested to make suggestions as to any corrections needed, [fol. 1100] or changes which you had felt were advisable in the operation of the Gilbertville Trucking Company?

Mr. Mueller: What was the date, Miss Kelley?

Exam. Baumgartner: November, '54.

Miss Kelley: November, '54.

The Witness: Specifically what suggestions, Miss Kelley?

By Miss Kelley:

Q. Well, my understanding is that you were asked a general question if you would make suggestions as to any corrections or suggestions you had for changes in the operations of the Gilbertville Trucking Company.

A. I don't recall; it would well have been.

Q. Do you recall Kenneth Nelson asking you to give him suggestions?

I understand that Kenneth Nelson asked you if you would give him suggestions for anything that you found or thought that he should change in connection with his operations.

A. I don't recall, no.

Q. Now, hasn't it been the practice of the district supervisors to notify carriers after visits with their terminals, and suggesting any change or criticism so that the carriers are more or less notified?

A. Only when conducting what we call compliance surveys, not when you're conducting an investigation.

Exam. Baumgartner: Not when you're conducting what?

The Witness: An investigation.

[fol. 1101] By Miss Kelley:

Q. Well, if a complaint is made by another motor carrier, and you make an investigation as a result of that, what do you characterize that type of investigation as?

A. As an investigation.

Q. Is that in the same category that you put this investigation?

A. Yes.

Q. Well, on a number of occasions, Mr. LaCour, I have received copies of letters which have been sent by Commission's representatives, district supervisors, after a complaint made by another motor carrier, and—

Mr. Mueller: Mr. Examiner,—

By Miss Kelley:

Q. Is it your testimony—

Mr. Mueller: May I enter an objection.

Exam. Baumgartner: Wait a minute. Let me get the question, please.

By Miss Kelley:

Q. Well, are you familiar with that practice of the Commission in notifying carriers?

A. Are you referring to what are commonly referred as warning letters?

Q. I consider them as warning letters; whether you folks do or not, I don't know.

A. Warning letters are usually issued under certain circumstances, or written under certain circumstances.

Q. And isn't that often after a complaint of one carrier to [fol. 1102] another carrier's operation?

A. It could be; I don't know what the practice is in any other office other than my own.

Q. But did you at any time write a letter to Mr. Kenneth Nelson of Gilbertville Trucking Company recommending changes, or advising them that in your opinion any of their practices or policies were not correct?

A. No, because it was clearly understood at the time the investigation was initiated.

Q. No such warning or notice?

A. No, the purpose of that, our purpose was given to Mr. Nelson at the time of the investigation.

Q. Was understood as what?

A. As being an investigation.

Q. In other words, he was told it was an investigation?

A. That's right.

Q. Was he given any warning when you went into his office that anything that he said might be used against him in an investigation or complaint proceeding?

A. We told him the purpose of our visit, that we were there in an effort to ascertain whether common control had been effectuated of the Gilbertville Trucking Company by L. Nelson, it was clearly understood.

Q. When did you say you—

A. At the outset of the investigation.

[fol. 1103] Q. Do you have any memorandum to show exactly when you said that?

A. No.

Q. And is it your position two years later that you used those words?

A. Not exactly those words, no.

Q. Now, other than your visit to the Gilbertville terminal on Monday morning of this week, had you made an inspection of the Gilbertville terminal of the Gilbertville Trucking Company?

A. On what Monday morning? Are you referring to November 9, 1954?

Q. No, you said that on Monday morning of this week, September 24, 1956, you went to the Gilbertville Trucking Company terminal.

A. This Monday morning?

Q. Yes.

A. I didn't testify that I went to the terminal; I said I ascertained the location of the terminal.

Q. But it is your testimony that you did not go to the terminal?

A. I did not physically enter the premises, that's correct.

Q. Now, had you, prior to that time, visited the terminal in Gilbertville, Mass.?

A. No.

Q. Now, am I correct that your investigation for this [fol. 1104] proceeding consisted of 2 visits on consecutive days in November, 1954; and accompanied with Mr. Shea to Ellington, Connecticut, and one visit alone to Ellington, Connecticut, on November 8, 1955?

A. May I have the question again, please?

Exam. Baumgartner: Read the question, Reporter.

(Question read.)

The Witness: I don't know what you mean by my investigation. If you want to know whether I visited the terminal on any days other than these,—

By Miss Kelley:

Q. Yes, that's what I want.

A. —I'll say I did not. That doesn't indicate that my investigation took place only during those 3 days, or any other period of time.

Q. But anytime that you talked to any of these parties, or were in the terminals of the Gilbertville Trucking Company, or L. Nelson & Sons, was only on these days?

A. Oh, no.

Q. Pardon me?

A. Again you said that I talked with the parties; I have talked with them on the telephone frequently in connection with other matters.

Q. In connection with other matters?

A. That's right.

Q. But, see, I'm limited to this investigation; I mean, [fol. 1105] these were the occasions that you went to the office; and, then, of course, you did become involved in the road check.

A. That's correct.

Q. In your investigation on Monday morning of this week, as to the town lines of Hardwick, Mass., did you find that those town lines are clearly marked so that they might be followed by you or by someone trying to determine where the premises were, on one side or the other, of the town line?

Exam. Baumgartner: Clearly marked?

Miss Kelley: At Hardwick, Massachusetts; between Hardwick and Ware.

Exam. Baumgartner: Well, are there any marks anyplace showing boundaries of anything?

Miss Kelley: That's what I'm trying to find out.

The Witness: There are signs by the side of the road indicating that you are passing from one town into the other, as in the case throughout most of Massachusetts.

Exam. Baumgartner: Road signs?

The Witness: Yes, sir; as you approach it on one side, sometimes it will say, "You are now entering such-and-such a place," or "You are leaving such a place," or in other instances, it will be merely the name of the town in which you are then, and the name of the town which you are passing through on the other side.

Exam. Baumgartner: Are those highway markers always posted at the legal corporate limits?

[fol. 1106] The Witness: I wouldn't know; I presume they are.

Miss Kelley: I have just a few other notes to check, Mr. Examiner, would you want to stop for lunch at this time and I could check these?

Exam. Baumgartner: Off the record.

(Discussion off the record.)

Exam. Baumgartner: On the record.

By Miss Kelley:

Q. With reference to the insurance of Nelson and Gilbertville, your testimony was that that was information you secured from whom?

A. Kenneth Nelson and Mr. Chilberg; this was on November 8, 1955, as I recall it.

Q. Now, the Commission has records of insurance and insurance certificates filed with the Commission by motor carriers, is that true?

A. Oh, yes.

Q. Did you check the records of the Commission with respect to the companies' filing insurance certificates for Gilbertville?

A. No, sir.

Exam. Baumgartner: For what time?

Miss Kelley: Well, for 1954, '55, and the present time. See, these certificates are on file with the Commission during that period.

The Witness: Our primary concern is whether or not [fol. 1107] they are insured, not so much which company they are insured by.

By Miss Kelley:

Q. Did you ask for any insurance policy so that you compared the names yourself?

A. I don't recall, Miss Kelley.

Q. Did you make a report similar to the type of report that Mr. Shea used to refresh his recollection as a result of your visit to, visit of November 8, 1955?

A. Do I make a report?

Q. Do you make reports?

A. Oh, yes.

Q. Did you use the report made on November 8, 1955, to refresh your recollection in connection with testimony that you presented here?

A. I did.

Q. And in your report, Mr. LaCour, did you put down, quoting the exact conversations, or did you summarize those conversations?

A. I summarized them.

Q. And is that also true with respect to your report for the first visit in November, 1954?

A. Yes, we make notes.

Q. So that your notes and memorandum represent your impressions of what the conversation was?

A. Oh, no, not impressions; actually what the conversation was in substance.

[fol. 1108] Q. In substance?

A. We don't intend to read their minds.

Q. You don't put the question and answer down exact words were used, do you?

A. No; very often a person will make a statement extemporaneously, which is valuable to us.

Q. Do you recall on your first visit to Ellington, Connecticut, that there was some criticism and a little unpleasantness because of complaints of women employees as to ungentlemanly conduct of Mr. Shea that was called to both your attention and to Mr. Shea's attention?

A. No. You'd better let me have that one over again.

Q. Pardon me?

A. I don't understand this.

Q. I mean, was there criticism of the manner in which Mr. Shea interrogated employees, particularly women employees, of the L. Nelson & Sons Company that resulted in a little unpleasantness on your first visit to Ellington, Connecticut?

A. Was there criticism?

Q. Yes.

A. By whom?

Q. Well, as I understand it, some of the women employees were involved in it because of what they contended was ungentlemanly and intimidating conduct, and that you and, I believe, Mr. Kenneth Nelson were involved in some difficulty [fol. 1109] culty in questions with respect to the women.

A. I received no criticism from anyone as to Mr. Shea's conduct with respect to women.

Q. I'm not inferring, please; please don't take it that I am inferring that it was, that the impropriety was that I believe that they felt Mr. Shea was attempting to intimidate them.

Mr. Mueller: Mr. Examiner, I think I should enter, interpose an objection to this type of questioning here. We have insinuations and innuendoes indicating misconduct, or improper conduct, on the part of Commission's employees.

If there is to be any evidence of that sort of thing, I suggest that Miss Kelley bring it forward herself; and she's been making statements here, she's not been asking questions.

Exam. Baumgartner: You answered the last question, didn't you?

The Witness: I don't recall that I answered the question.

Exam. Baumgartner: There is no question pending, is there?

Miss Kelley: Well, I think there is. Did you get an answer to that question?

The Witness: I don't believe I said I didn't recollect. I am very clear as to what I am about to say, and if I interpret your question correctly as to whether such criticism was received by me, my answer is no.

[fol. 1110] By Miss Kelley:

Q. Well, may I say, do you recall that you were complimented on the gentlemanly manner in which you conducted your investigation?

A. But we are now, as I understand it, referring to some complaints, allegedly filed by some female employee of either Gilbertville or Nelson.

Q. My understanding is that the, that it resulted from complaints as to the tone and manner of questions with respect to the employment and the duties of women employees of L. Nelson & Sons Company.

A. This is the first I have heard of any such criticism.

Mr. Mueller: May I have that answer?

The Witness: This is the first I have heard of any such criticism.

By Miss Kelley:

Q. Do you recall that you were complimented on the gentlemanly manner in which you conducted your investigation?

A. I well might have been; I don't recall that either.

[fol. 1111] Redirect examination.

[fol. 1114] By Mr. Mueller:

Q. And what is the town immediately to the south of Palmer?

A. Monson.

Q. And is there another town to the east, town or towns?

A. Brimfield and Warren.

Q. Is there a town to the west that you can identify from the map, west of Palmer, would it be Wilbraham?

A. It might possibly be Wilbraham.

Q. Or Ludlow?

A. There is a portion of Monson which is west of Palmer.

Miss Kelley: But doesn't show on the map.

The Witness: It doesn't show on this map.

By Mr. Mueller:

Q. Now, in answer to Miss Kelley, you stated that on the occasion of your first visit to the Ellington terminal in 1954, you told Kenneth Nelson of the purpose of your visit?

A. Yes, we did.

Q. Can you tell us just where on the premises that conversation occurred?

A. On the first floor.

Q. Near the entrance?

A. Near the entrance, and in the vicinity of the teletype machine at which he was seated when we entered.

Mr. Mueller: I think that's all, Mr. Examiner.

[fol. 1117] EDWARD D. SHUA recalled, and testified as follows:

Exam. Baumgartner: Proceed, Mr. Mueller.

Miss Kelley, this, of course, is understood subject to [fol. 1118] your objection.

Miss Kelley: Yes, sir; of course, I'm going to object.

Exam. Baumgartner: Based on hearsay.

Miss Kelley: Yes, sir, and that it does not represent any exception to the hearsay rule in my opinion.

Direct examination.

By Mr. Mueller:

Q. Did you question Mr. Kashady on the occasion of your visit of October 22, 1954, concerning leasing of vehicles between Nelson and Gilbertville?

Miss Kelley: Mr. Examiner, don't you think we ought to make it clear on the record that Mr. Shea has been recalled, and as to identifying him as the same?

Exam. Baumgartner: That's on the record already.

Miss Kelley: I'm sorry; I didn't hear it said.

Mr. Mueller: May I withdraw that question, Mr. Examiner?

Exam. Baumgartner: Yes, you may; I thought it was a little bit indefinite.

By Mr. Mueller:

Q. Did you question Mr. Kashady as to his connection with the corporation known as the Gilbertville Trucking Company?

A. I did.

Exam. Baumgartner: In what conversation, and where?

The Witness: At the Ware, Mass., airport on October 22, 1954.

By Mr. Mueller:

Q. And what did he say on that subject in response to [fol. 1119] your questions?

A. He told me that he was a vice-president of the Gilbertville Trucking Company, Inc., that Kenneth Nelson was president and treasurer, that he did not know who the clerk of the corporation was, or where the records of the corporation were kept; he told me that Mr. Kenneth Nelson had given him 24 shares of stock of the Gilbertville Trucking Company, Inc., that Kenneth Nelson had showed him the stock certificate, but did not permit him to retain it.

Q. Whether or not he paid anything for the stock?

A. He did not so inform me.

Exam. Baumgartner: He did not what?

The Witness: So inform me.

By Mr. Mueller:

Q. Did you question him about his background as to what employment he had prior to being associated with Gilbertville?

A. I did.

[fol. 1120]

By Mr. Mueller:

Q. Did he say whether or not he had been previously employed by Nelson?

A. He did.

Q. And did he say for how long?

A. He worked for L. Nelson & Sons for 15 years.

Q. Did he say in what capacity?

A. He said he was assistant terminal manager in Boston, Mass.

Q. Did you ask him to explain the leasing practices between the Nelson Company and the Gilbertville Company?

A. I did.

[fol. 1121] A. Mr. Kashady explained the leasing in this way: That when either of the companies were handling a shipment outside their own operating authorities, they leased vehicles from one to the other; and he gave an example of a shipment moving from New York to Pittsfield, Mass., would come into Rockville, Connecticut, on L. Nelson paper, and from Rockville, Connecticut, to Pittsfield, Mass., it would move forward on Gilbertville paper.

Exam. Baumgartner: What do you mean by paper?

The Witness: Leases.

By Mr. Mueller:

Q. Do you also refer to bills of lading?

A. Bills of lading, or shipping papers.

[fol. 1122] Q. And what about the use of the same vehicle for the movement of that shipment?

A. I asked Mr. Kashady of an instance such as he used to describe, if the same driver—

Q. I asked you about vehicles, Mr. Shea.

Miss Kelley: I object.

The Witness: Was the question related to vehicle?

By Mr. Mueller:

Q. Whether the same vehicle would be used beyond Rockville?

A. Yes, he said the same vehicle—

Exam. Baumgartner: Just a moment. You may answer, subject to the objection.

Go ahead.

The Witness: He said, yes, usually the same vehicle would go through on truckload.

By Mr. Mueller:

Q. Now, did you inquire him to the use of Nelson drivers in subsequent instances?

A. He said that in response to the question that the same driver would remain with the vehicle, and he said, "usually, yes."

Q. Did you inquire from him as to repairs of Gilbertville vehicles, and where they were made?

Miss Kelley: I object.

Exam. Baumgartner: You may answer.

The Witness: Mr. Kashady told me that all repairs to [fol. 1123] the Gilbertville Trucking Company vehicles were made at the shogs of L. Nelson & Sons Company in Rockville, Connecticut.

Mr. Mueller: You may inquire.

Exam. Baumgartner: Miss Kelley?

Cross examination.

By Miss Kelley:

Q. Now, at what point did you find Mr. Kashady?

Exam. Baumgartner: With respect to what?

Miss Kelley: Well, Mr. Shea said that he talked to Mr. Kashady; I wanted to know at what point he talked to him, and where he found him.

The Witness: I met him in the yard of the Ware airport as I drove in. I saw this man, and I told him who I was, and asked him who he was.

By Miss Kelley:

Q. And did you learn what his activities, or what his position was as far as the type of work that he did for the Gilbertville Trucking Company?

A. He told me that he was terminal manager at Gilbertville, but that he also drove tractor-trailer around, sometimes picking up shipments.

Q. As terminal manager at Gilbertville, Massachusetts?

A. He was terminal manager for the Gilbertville Trucking Company.

Exam. Baumgartner: Did you say where?

The Witness: Right where he was, at Ware, Mass., at the [fol. 1124] Ware Airport.

Exam. Baumgartner: You ought to get those things in the record.

The Witness: Yes, sir.

By Miss Kelley:

Q. And did you inquire of him what authority he had to speak with respect to the operations or on the matters that you questioned him on? What authority he had to speak for the Gilbertville Trucking Company?

Mr. Mueller: I object to the question, Mr. Examiner; it's repetition, and it appears that the man is vice-president and terminal manager.

Exam. Baumgartner: Just a moment. Mr. Reporter, will you please read the question; I didn't catch the first part of it.

.(Question read)

Exam. Baumgartner: You may answer the question, Mr. Shea.

The Witness: He told me that he was vice-president and general manager of the company, and that he was in charge of the terminal.

By Miss Kelley:

Q. Did he tell you he was general manager of the Gilbertville terminal, or terminal manager of the Gilbertville terminal?

A. He said terminal manager instead of general manager, I meant to say terminal manager.

[fol. 1125] Q. Mr. Shea, don't you know that vice-presidents are normally given just a title, that that's a mere title?

Exam. Baumgartner: Miss Kelley, that doesn't make any difference what this witness knows about the functions or lack of functions of a vice-president.

I think that's an argumentative question.

By Miss Kelley:

Q. Did you inquire of Mr. Kashady of what period he claimed to have been an assistant terminal manager in Boston for L. Nelson?

A. Yes; since Kenneth Nelson offered him the job; but he didn't specify the date.

Q. I'm sorry, I don't follow you on that.

Exam. Baumgartner: Maybe he didn't understand the question.

Did you understand the question?

The Witness: She wanted to know how long he had been terminal manager at Ware.

Exam. Baumgartner: No, that wasn't the question.

She asked you whether you had inquired of him.

By Miss Kelley:

Q. I mean, your statement that he had been an assistant terminal manager at Boston; did I understand you correctly?

A. For L. Nelson for 15 years.

Q. Did you inquire, during the 15-year period, where Mr. Kashady resided?

[fol. 1126] A. I did not.

Q. Did you know that he had resided in Connecticut prior to taking over the, prior to becoming the terminal manager at Gilbertville, Mass.?

A. I did not.

Q. Now, Mr. Kashady informed you, I believe you stated in your previous testimony, that the accounting records and bookkeeping records of L. Nelson were kept at Ellington, Connecticut?

A. He stated all the billing and bookkeeping records of the Gilbertville Trucking Company were kept at Rockville, Connecticut.

[fol. 1127] Mr. Mueller: Mr. Examiner, I now offer Exhibit Nos. 27 through 35, for the record, offer them in evidence.

[fol. 1130] Miss Kelley: I'll permit this Exhibit 28 to be admitted in evidence together with Exhibit 27, 29 through 35.

The testimony, as I recall it, is that this is a document that was taken and found in the files of the company, and apparently a live file so far as we know; and for that reason, I think it does have some relevancy.

There may be some question as to the weight to be accorded it, whether it be little, or much; but these Exhibits, 27 through 35 for identification will be admitted in evidence.

(Commission's Exhibits Nos. 27 through 35, Witnesses Shea and LaCour, were received in evidence)

[fol. 1143] Exam. Baumgartner: * * * Now, who is to initiate this stipulation?

[fol. 1144] STIPULATION OF COUNSEL

Mr. Mueller: Mr. Examiner, after observing maps and consulting with the engineer produced by Miss Kelley, it is stipulated that the distance from the nearest distance from the corporate limits of the town of Palmer, Massachusetts, to Route 83 in Massachusetts and Connecticut is 8.95 miles.

Exam. Baumgartner: That's Massachusetts and Connecticut Highway No: 83?

Mr. Mueller: Massachusetts and Connecticut highway.

Exam. Baumgartner: Do you so stipulate?

Miss Kelley: Yes, sir, I do; and that a vehicle operating over Route 83 is travelling within a ten-mile radius, or gateway area, of Palmer under Gilbertville's certificate.

Mr. Mueller: That would be on handling Connecticut and Rhode Island traffic.

Miss Kelley: Going through that gateway, yes.

Mr. Mueller: It is so agreed.

I believe we have concluded our stipulation.

[fol. 1175] KENNETH H. NELSON previously sworn, was re-examined and testified as follows:

Direct examination.

By Miss Kelley:

Q. Mr. Nelson, you were not here today earlier in testimony, and I want to ask you if when Mr. LaCour came to your office in November of 1954, had you seen Mr. LaCour before that time?

A. No, I had never seen him before.

Q. Had you seen Mr. Shea before?

[fol. 1176] A. No, I had not.

Q. Did either one of them identify themselves?

A. Yes; Mr. Shea identified himself, and Mr. LaCour did not.

Q. Well, in other words, how did they identify themselves?

A. As I recollect, they came into the office, Mr. LaCour was first, and he said that his name was Mr. LaCour, and I had heard his name before, and knew of him; and Mr. Shea pulled out his wallet and identification badge, and so on, and let me peruse his identification papers.

Q. So that having heard of Mr. LaCour before—

A. I had heard of him before.

Q. But you had not met him before that day.

A. No, I had never seen him before.

Q. Now, did Mr. LaCour advise you of the purpose of the investigation?

A. No, he did not.

Q. The first date, I believe, was November 9, 1954; and now can you recollect on either November 9, 1954, or November 10, when he and Mr. Shea returned the following day, did they at any time advise you of the nature of their investigation?

A. No, they did not; and I was particularly interested in knowing what the nature of their visit was.

Q. Now, Mr. LaCour testified further that on a date in November of 1955 he called again at the office at Ellington, [fol. 1177] Connecticut, and talked to you, do you recall that visit?

A. Yes, I do.

Q. At that time, did you say anything to Mr. LaCour about thwarting an investigation of the Interstate Commerce Commission?

A. Absolutely not.

Q. Did you co-operate in furnishing information that was requested that was available?

A. I told both Mr. LaCour and Mr. Shea that any records that they wanted to see was available to them just upon asking; there wasn't a thing in the office that wasn't available to them if they would just simply ask me for it.

[fol. 1178]

APPLICANT'S EXHIBIT #22

Agreement made this second day of March, 1953 by and between WILFRED J. VACHON of Hardwick Road, Gilbertville, Massachusetts, party of the first part and KENNETH NELSON of 32 Earl Street, Manchester, Connecticut, party of the second part. The party of the first part agrees to sell and the party of the second part to purchase one hundred shares of stock in the GILBERTVILLE TRUCKING COMPANY, INC., a Massachusetts corporation with its regular and usual place of business in Gilbertville, Massachusetts. Said one hundred shares of stock

being the total of all capital stock issued and outstanding in the Gilbertville Trucking Company, Inc.

The terms and conditions of the said sale are as follows:

1. The party of the first part agrees to transfer all the shares of the capital stock standing in his name and agrees on behalf of his wife, Opalma Vachon to cause her to transfer the shares of the corporation standing in her name.

2. The seller warrants that the corporation is the owner of certain Interstate Commerce Commission operating authorities as exhibited by I.C.C. docket numbers, MC87431 and MC87431 sub 7 and Massachusetts Department of Public Utilities rights. The seller further warrants that the Massachusetts Department of Public Utilities rights are for general commodities and are unrestricted and cover the entire State of Massachusetts.

3. The seller further agrees that the rolling stock of the corporation consists of:

1—1948 Autocar T70 TS Tractor

1—1945 L.F.T. Mack Tractor

1—1945 Brockway XW Tractor

1—1946 G.M.C. Truck with semi-van body straight Tractor

1—1941 Highway semi Trailer full van

1—1940 Highway semi Trailer van half roof

1—1940 Freuhauf Open rack Trailer

1—1939 G.M.C. Trailer open rack

[fol. 1179] The purchase price of the said capital stock shall be arrived at as follows:

A base price of \$35,000.00 to be increased by the following assets as shown on the audit report of the Gilbertville Trucking Company, Inc. as at February 28, 1953; cash, good accounts receivable due from customers and prepaid items and to be reduced by the detailed list of liabilities as shown on the said audit report as at February 28, 1953.

In consideration and on account of the above purchase price, \$10,000.00 is hereby paid and the receipt thereof is

hereby acknowledged, the balance of the purchase price is to be paid as follows:

A promissory note made payable to Wilfred J. Vachon in the amount of \$10,000.00 with interest at 4% per annum on any unpaid balance, payable jointly and severally, by Kenneth Nelson and Oscar Herbert Chilberg, first payment to commence August 1, 1953 and every three months thereafter in equal payments of \$500.00 with interest until paid in full. This note is to be executed on May 1, 1953. Said note is to contain a clause reserving the right of anticipation of payment by the makers. In the event of default of two consecutive payments, the unpaid balance shall become due and payable at once. Any reasonable attorney's fees and costs of collection shall be paid by the makers and stated in said note. As security for the payment of the said note, the purchasers shall deposit the stock of the corporation with Attorneys Samuel Zandan and Arthur Paroshinsky who shall both hold in escrow until full payment of the note, at which time they shall turn the said stock over to the purchasers. In the event of default, as mentioned within the note, Attorneys Samuel Zandan and Arthur Paroshinsky shall convey or return the stock to Wilfred J. Vachon.

[fol. 1180] . The balance of the purchase price shall be paid to Attorneys Samuel Zandan and Arthur Paroshinsky to be held in escrow for the payment of the liabilities as shown on the audit report as of February 28, 1953 or any other indebtedness of the corporation which shall come to the attention of Attorneys Samuel Zandan and Arthur Paroshinsky, which indebtedness was in existence on or prior to February 28, 1953. On July 1, 1953, the balance of the money remaining in the hands of Attorneys Samuel Zandan and Arthur Paroshinsky shall be turned over to Wilfred J. Vachon with a complete accounting of all funds held by them.

The seller will further execute and deliver to the purchaser an agreement indemnifying the purchasers against any liabilities other than what appears on the audit report as of February 28, 1953 and will defend any action brought by anyone against the corporation and will save the pur-

chasers harmless against any indebtedness or claims occurring prior to March 1, 1953.

The seller further agrees that he will not, for a period of five years, either directly or indirectly, engage in the business of a common carrier for any of the territory which is covered in the I.C.C. rights or the Massachusetts Department of Public Utilities rights which are sold. However, he shall be allowed to continue the business of renting or leasing of trucks anywhere outside of a radius of thirty miles from Palmer, in the State of Massachusetts.

The purchasers agree to see that the Gilbertville Trucking Company, Inc. observes all Federal, State and Municipal regulations pertaining to the conduct of the business, more particularly regulations set forth by the I.C.C. and Department of Public Utilities of the Commonwealth of Massachusetts.

[fol. 1181] In the event of any violation of any regulations, then the purchasers shall be given a reasonable time to advise the corporation of said violations and to order that the corporation correct said violations.

It is agreed between the parties that, if for any reason, the purchaser shall not deposit the balance of money due in escrow to Attorneys Samuel Zandan and Arthur Paroshinsky on or before May 1, 1953 and shall not sign the note described above, then and in that event this agreement shall be null and void and the seller shall retain the sum of \$5,000.00 as liquidated damages and shall return the sum of \$5,000.00 to the purchaser and the purchaser shall be obligated to return all and any of the assets which are conveyed above, including certificates of stock now held in escrow.

WITNESS our hands and seals this third day of March, 1953.

(s) ARTHUR PAROSHINSKY

(s) WILFRED J. VACHON

(s) SAMUEL ZANDAN

(s) KENNETH NELSON

The L. Nelson and Sons Transportation Company
Equipment Operated by Nelson
As of July 31, 1956

	Number of Vehicles	Number of Years of Manufacture				
		Prior to 1948	1948- 1953	1954	1955	1956
<u>Trucks - Vans:</u>						
International	14		2	5	6	1
<u>Tractors:</u>						
International	61		23	8	14	16
<u>Trailers - Vans:</u> <i>and Semi Van.</i>						
Pruehauf	21		18	2	1	
Strick	10		6	3	1	
Kentucky	18		18			
Gindy	21		3		9	9
Brown	4		4			
Netco	1	1				
Great Dane	2				1	7
	83	1	49	5	12	16
<hr/>						
Total Revenue Equipment	158	1	74	18	32	33

[fol. 1182]

APPLICANT'S EXHIBIT No. 24

Gilbertville Trucking Company, Incorporated
Equipment Operated by Gilbertville
As of July 31, 1956

672

[fol. 1183]

APPLICANT'S EXHIBIT No. 25

	Number of Vehicles	Number of Years of Manufacture				
		Prior to 1948	1948- 1953	1954	1955	1956
<u>Trucks - Wagon:</u>						
International	15	2			6	7
<u>Tractors:</u>						
International	12		2		5	5
<u>Trailers - Wagon:</u>						
Strick	1		7			
Freuhuf	1		1			
	8		8			
Total Revenue Equipment	35	2	10		11	12

11-10-54

INTERSTATE COMMERCE COMMISSION
BUREAU OF MOTOR CARRIERS

COPY FOR
MOTOR CARRIER'S REPLY

DRIVER-EQUIPMENT COMPLIANCE CHECK

Name of carrier **GILBERTVILLE TRUCKING Co** Date **11-10-54**

Address **At 83 + 1/2 ...**

Place of inspection **At 83 + 1/2 ...** Time **10 A** m

	ICC Tag	State Tag	Company No	Make	ICC Tag	State Tag	Company No
Bus							
Truck	8783	GA	97	Ken	7226	GA	752
Tractor							

	Rule No
Service (foot) performance	
Parking (hand)	
Hose and connections	
Automatic breakaway	

STEERING MECHANISM

FUEL TANKS

Head	Stop	Tail	
Front clearance			
Rear clearance			
Side marker			
Reflectors			
Wiring and connections			

	Rule No
Safety glass	3 23
Windshield wipers	3 43
Rear view mirror	2 07
Head	2 07
Coupling devices	2 07
Safety chains (full trailer)	2 346
Tires	2 07
	2 347

11-10-54
R. M. ...
...
...

...
...
...

BRAKES	Service (foot) performance		Automatic breakaway	
	Parking (hand)			
	Hose and connections			
STEERING MECHANISM				2 07-4 2
FUEL TANKS				3 345
LIGHTS, SIGNALS AND REFLECTORS	Head	Stop	Tail	
	Front clearance			
	Rear clearance			
	Side marker			
	Reflectors			
	Wiring and connections			
SAFETY DEVICES AND EQUIPMENT	Safety glass	Rule No.	Coupling devices	2 07
	Windshield wipers	3 38	Safety chains (full trailer)	2 346
	Rear view mirror	3 43	Tires	2 07
	Horn	2 07		2 3400
	Fire extinguisher	3 341		2 07
	Flares or red electric lanterns	2 081 (a)	Spare light bulbs	2 347
	Fuses	3 3491 (a)	Spare electric fuses	
	First aid kit	2 081 (g)		
	Hand ax	3 3491 (g)		
		2 081 (h)		
	3 3491 (h)			
	2 081 (i)			
	3 3491 (i)			
DRIVER'S LOG	Driver's log	How maintained		
	Excess hours: Daily	Weekly		
	Sleeper berth			

PROPER MARKING: Cargo tanks

Other vehicles

Vehicles used for transportation of explosives or other dangerous articles

REMARKS

Copy received by

Inspected by

Title

Title

(OVER)

10-12-50-1 U. S. GOVERNMENT PRINTING OFFICE

fol. 1184

GOVERNMENT'S EXHIBIT No. 27

673

INTERSTATE COMMERCE COMMISSION
BUREAU OF MOTOR CARRIERS

COPY FOR
MOTOR CARRIER'S REPLY

DRIVER-EQUIPMENT COMPLIANCE CHECK

[Vol. 1185]

674

GOVERNMENT'S EXHIBIT No. 29

Name of carrier L NELSON & SONS Date 5-12-55
Address Rockville Conn
Place of inspection RT 146 No Smithfield R.I. Time 11 A

	ICC Tag	State Tag	Original No.	Make		ICC Tag	State Tag	Company No.
Bus				Truck	Semitrailer		6889	T-10
Truck				Tractor	Full trailer		R.L.	
Tractor					Pole trailer			

	Rule No.
Service (foot) performance	
Parking (hand)	
Hose and connections	
Automatic breakaway	

STEERING MECHANISM 2.07-a 3

FUEL TANKS 2.345

Head	Stop	Tail
Front clearance		
Rear clearance		
Side marker		
Reflectors		
Wiring and connections		

	Rule No.
Safety glass	2.33
Windshield wiper	2.43
Rear-view mirror	2.07
Horn	2.341
	2.07
	2.343
	2.07
	2.344

Fire extinguisher	2.081 (a)
Flares or red electric lanterns	2.3491 (a)
Fuses	2.081 (g)
Flags and standards	2.3491 (g)
	2.081 (h)
	2.3491 (h)
	2.081 (i)
	2.3491 (i)

Lighter rather than heavy
on bed plate
Coupling devices
Safety chains (full trailer)
Tires
Spare light bulb
Spare electric fuses
ON BUSES ONLY
First-aid kit
Hand ax

OK

[fol. 1186]

GOVERNMENT'S EXHIBIT No. 30

GILBERTVILLE TRUCKING CO., INC.

BRANCH

DELIVERY RECEIPT

P. O. BOX 58
GILBERTVILLE, MASS.

MAIN OFFICE: GILBERTVILLE, MASS. PHONE GILBERTVILLE 3171

R

67848

BOSTON OFFICE -
LAWRENCE, LOWELL -
WORCESTERDedicator 9312
Enterprise 5002
Pleasant 43867NEW YORK, N. Y.
NEW ENGLAND
PHILADELPHIA, PA.RAVENSWOOD 1-1158
NEW JERSEY
WILMINGTON, DEL.PHILADELPHIA
WOONSOCKET
ROCKVILLEGARDEN 6-3800
6347
65-2224Boston Camping List Company
15 Oliver Street
Boston, Mass.

COLLECT

Kingfisher Bristol Company
Rockville, Connecticut

DATE 5-1-55

PREPAID

XXX

NO. PIECES

DESCRIPTION OF ARTICLES

WEIGHT

RATE

TRUCK NO.

3 COLE FUEL LINE

27

ADVANCE
CHARGESOUR
CHARGES

OWN CARRI

OUR DIVISION

TAX

LOADING
CHARGESPIER &
CHARGES

TOTAL

SIGN
HERE X

ABOVE GOODS RECEIVED IN GOOD CONDITION BY

DATE
HERE X

SIGNATURE

DATE SHIPMENT RECEIVED

INTERSTATE COMMERCE COMMISSION

BUREAU OF MOTOR CARRIERS

DRIVER-EQUIPMENT COMPLIANCE CHECK

COPY FOR MOTOR CARRIER'S REPLY

[fol. 1187]

676

NAME OF CARRIER NELSON + SONS TRAW

DATE 5-2-57

ADDRESS Rockville Conn

MC 42871

PLACE OF INSPECTION Rt 15 Union Conn

TIME 11:20 A M

VEHICLE	NAME	UNIT NO. AND LAST NO. NUMBER	CARRIER CODE	NAME OF DRIVER	RELIEF DRIVER
1	W	99	✓	Martin	
2	J	T0153	✓		

AGE OF UNIT IN YEARS none with

DRIVER'S LICENSE 1-258

EXPIRATION DATE 1-2-58

ON DUTY yes

By Boys Wal P20174 Phil & Ned
2 Ch. Rain you P30195 Phil to Conter

STEERING MECHANISM

FUEL SYSTEM

SERVICE (FOOT) BRAKE

PARKING (HAND) BRAKE

TUBING AND HOSE

WARRANTY

CONNECTIONS

AIR BRAKE WARNING DEVICE

COUPLING DEVICES

STOP

FRONT CLEARANCE

REAR CLEARANCE

WEIGHTS

DEFLECTOR

BATTERY

WHEELS

MUST BE CORRECTED

GROUPS

CONNECTIONS

REAR VIEW MIRRORS	✓	EXHAUST	✓
WINDSHIELD WIPERS	✓	TIRES	✓
REFLECTOR	✓	LOADING PROTECTION	
EXHAUSTION	✓	CARGO-SHOOTING PROTECTION	
REAR VIEW MIRRORS	✓	FLOORS	✓
FIRE EXTINGUISHER	✓	SPARE FUEL	✓
FUEL	✓	TIRE CHAINS	✓
FLAME REFLECTOR OR LANTERN	✓	HANDTOOLS	✓
FLARE AND STANDARDS	✓	HAND-AXE (BUL)	
SPARE TIRE	✓	FIRST-AID KIT (BUL)	

5th wheel loose on bed plate

Also load Galtville Lumber Co. Pm B67848

3 Ctn Freshman Rm 15 Bm

INTERNATIONAL COMMERCE COMMISSION

Martin

Sept 10 1948

their brother of the controlling stock in Gilbertville Trucking Co., Inc., will not result in common control of the operations authorized in MC 64627 and will not bring about an improper competitive situation; therefore,

It is ordered, That the transfer to the transferee named above of the specified operating rights be, and it is hereby, approved and authorized subject to the condition that within 90 days from the date hereof the said transferee and transferor shall consummate the transaction and confirm in writing to the Commission the date of such consummation.

It is further ordered, That upon compliance by the said transferee and transferor with the condition set forth in the next preceding paragraph hereof, and by transferee (also within a period of 90 days) with the provisions of Sections 215 and 217 of the Act and the requirements, rules, and regulations prescribed thereunder covering the filing of common carrier rate publications and the filing and approval of evidence of security for the protection of the public, the authority specified in the appendix hereto shall be in force with respect to the transferee, and it thereupon shall be lawful for the transferee to engage in operations as the holder of such operating rights.

[fol. 1198] *It is further ordered,* That should the present conditions change so as to bring about common control of the operations authorized in Certificates Nos. MC 42871 and MC 64627, consideration will be given to appropriate action to eliminate such common control or otherwise correct any improper competitive situation resulting from such common control

And it is further ordered, That unless the condition specified in the first ordering paragraph hereof is fulfilled within the time therein specified, this order shall be of no further force and effect.

By the Commission, Motor Carrier Board.

GEORGE W. LAIRD, Secretary.

(SEAL)

APPENDIX

The foregoing order approves and authorizes, subject to the conditions specified therein, transfer of the operating rights set forth in Certificate No. MC 64627, issued by the Commission June 2, 1943, in the name of the transferor herein.

NOTE: The operating rights which are the subject of this order have been assigned No. MC 87431 Sub 8.

NOTICE TO PARTIES: Special Rules of Practice Governing Procedure of the Motor Carrier Board provide that petitions for reconsideration of the action of the said Board may be filed within 30 days following service of notice of such action.

* Prior order did not include the paragraph requiring consummation of the transaction.

[fol. 1199]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—

February 19, 1962

Appeal from the United States District Court for the District of Massachusetts.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

February 19, 1962

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U. S.
FILED

NOV 10 1961

JOHN F. DAVIS, CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1961

No. ~~322~~ 410

GILBERTVILLE TRUCKING CO., INC.,
THE L. NELSON & SONS TRANSPORTATION
COMPANY, CHARLES G. CHILBERG, CLIFFORD
J. O. NELSON, GRETA C. CARLSON, and
KENNETH A. H. NELSON,
APPELLANTS,

v.
THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1961

No.

**GILBERTVILLE TRUCKING CO., INC.,
THE L. NELSON & SONS TRANSPORTATION
COMPANY, CHARLES G. CHILBERG, CLIFFORD
J. O. NELSON, GRETA C. CARLSON, and
KENNETH A. H. NELSON,
APPELLANTS.**

**THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
APPELLEES**

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS**

JURISDICTIONAL STATEMENT

Appellants have appealed from a final judgment of the
United States District Court for the District of Mas-

sachusetts which dismissed their suit to enjoin and set aside certain orders of the Interstate Commerce Commission. They submit this Statement to show that the Supreme Court of the United States has jurisdiction of their appeal and that substantial questions are presented thereby.

OPINIONS BELOW

The opinion of the District Court for the District of Massachusetts, which contained its findings of fact and conclusions of law, is reported at 196 F. Supp. 351. The Report of the Interstate Commerce Commission on Reconsideration is printed at 80 M.C.C. 257; the Prior Report by Division 4 is printed at 75 M.C.C. 45; the Report of the Examiner is unpublished. Copies of the opinion and judgment of the District Court and of the Report of the Examiner are attached as Appendix A hereto.

JURISDICTION

This suit was brought in the court below pursuant to 28 U.S.C. § 1336 and 49 U.S.C. § 17(9) (54 Stat. 916 (1940)), and was heard and determined by a district court of three judges as required by 28 U.S.C. § 2325. The judgment of the District Court was entered on July 18, 1961, and notice of appeal was filed in that Court on September 11, 1961. The jurisdiction of the Supreme Court of the United States to review that judgment on this direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b) and has been sustained in, e.g., *Minneapolis & St. Louis Railway Co. v. United States*, 361 U.S. 173; *County of Marin v. United States*, 356 U.S. 412; *McLean Trucking Co. v. United States*, 321 U.S. 67.

QUESTIONS PRESENTED

a. In a proceeding for judicial review of a decision of the Interstate Commerce Commission, did the District Court err by affirming the Commission upon grounds different from those relied upon by the Commission, in that

- (1) the District Court made new findings of fact which were contrary to the findings made by the Commission and further presumed that facts which were not proved in an investigation proceeding before the Commission were unfavorable to the respondents therein?
- (2) the District Court rejected certain other facts upon which the Commission may well have relied, but nevertheless refused to remand the case to the Commission for reconsideration?
- (3) the District Court employed a finding of ultimate fact and a legal theory both of which were different from those upon which the Commission had decided the case?

b. Did the Commission fail to comply with the essential requirements of the Administrative Procedure Act, the Interstate Commerce Act and the decisions of this Court, in that

- (1) the Commission's Report merely states in narrative form a number of facts (including many trivial, irrelevant, innocent and ambiguous matters), and then, without any reasoning or other indication of which facts were considered important, asserts an ultimate conclusion?
- (2) the Commission has entered a remedial order without having made any adequate finding of the

requisite fact that a violation of section 5(4) of the Interstate Commerce Act is continuing?

- (3) the Commission has ordered divestiture of a specified carrier without having found that such divestiture is necessary?

c. Did the Commission err in ruling that the fact that a violation of law has been found requires denial of an application for approval of a proposed merger

- (1) even if the public interest dictates approval of the proposed merger?
 (2) even if the supposed violation found was innocent?

d. Did the District Court err in affirming the Commission's decision without finding or being able to find that the Commission's decision or its findings were supported by substantial evidence on the whole record?

STATUTES INVOLVED

Relevant parts of sections 7(c), 8(b), and 10(e) of the Administrative Procedure Act (60 Stat. 241, 242, 243; 5 U.S.C. §§1006(c), 1007(b), 1009(e)) and of sections 5(2), 5(4), 5(5), 5(6), and 5(7) of the Interstate Commerce Act, as amended (54 Stat. 905, 907, 908; 63 Stat. 485; 49 U.S.C. §§5(2), 5(4), 5(5), 5(6) and 5(7)) are set forth as Appendix B hereto, and are hereinafter cited by act and section number alone.

STATEMENT

On October 6, 1955, more than six years ago, two incorporated interstate motor carriers, The L. Nelson & Sons Transportation Company (hereinafter called Nelson Co.)

and Gilbertville Trucking Co., Inc. (hereinafter called Gilbertville Co.) filed with the Interstate Commerce Commission a joint application pursuant to section 5(2) of the Interstate Commerce Act. The application sought Commission approval of a proposed transaction by which Nelson Co. would acquire control of Gilbertville Co. (through an exchange of stock and subsequent merger of the two carriers) and derivative control of Gilbertville Co. would be acquired by Nelson Co.'s two principal stockholders, Charles G. Chilberg and Clifford J. O. Nelson, who are also directors and respectively president and treasurer and secretary and assistant treasurer of Nelson Co.

Nelson Co., a Connecticut corporation domiciled at Ellington, Connecticut, does business as a common carrier by motor vehicle in interstate commerce. It holds irregular route authority to transport general commodities intrastate in Connecticut and Massachusetts and specified commodities associated with the manufacture of cloth interstate between certain points in New England and certain other points in New England, New York, New Jersey and Pennsylvania.

Gilbertville Co. is a Massachusetts corporation domiciled at Gilbertville, Massachusetts. It is a common carrier by motor vehicle in interstate commerce authorized to carry general commodities over regular and irregular routes within Massachusetts and over irregular routes between certain points in Massachusetts certain points in New York, New Jersey, Connecticut and Rhode Island and to carry specified commodities over some regular and some irregular routes among certain points in New England, New York, New Jersey and Delaware.

On December 20, 1955, two and a half months after the application was filed, the ICC, acting under section 5(7) of the Interstate Commerce Act, initiated an investigation

to determine whether control and management of the two carriers in a common interest had already been effectuated in violation of section 5(4) of the Interstate Commerce Act. The respondents named in the investigation proceeding were the two corporate and two individual applicants and, in addition, Kenneth A. H. Nelson, who is president, treasurer and a director of Gilbertville Co. and beneficial owner of all of its stock, and Greta C. Carlson, the minority shareholder, a director and vice-president of Nelson Co.

Proceedings on the application and proceedings on the investigation, numbered respectively MC F-6099 and MC F-6178 on the dockets of the ICC, were consolidated for hearing and decision. The two proceedings were further commingled in the Commission's decision, for the decision in the investigation proceeding eventually became the sole reason for denial of the application.

After a lengthy hearing held in September of 1956, the Examiner concluded that the application should be granted, thus rendering the investigation moot. He found that "the case in hand appears to be on the borderline" with respect to the alleged violation of section 5(4) (p. A-62, *infra*), but, relying upon the statutory conclusive presumptions of sections 5(5) and 5(6) of the Interstate Commerce Act, he held that control and management of Nelson Co. and Gilbertville Co. in a common interest "were effectuated" and "are *presumably* continuing." (pp. A-62 - A-63, *infra*; accord, p. A-69, *infra*) (Emphasis added.) Nevertheless he found that the proposed merger should be approved pursuant to section 5(2) because it would be in the public interest. (p. A-79, *infra*) The Examiner expressly found that the merger would not be harmful to competition¹ and, on the basis of his personal observation

¹ Gilbertville Co. and Nelson Co. are both small carriers, especially compared to the large carriers and groups of carriers with whom they must compete. (see pp. A-50 - A-58, A-76, *infra*)

of the individual applicants in the hearing before him, that the applicants were not unfit:

In the case at bar, there is no evidence of extensive or flagrant violations of either the act or the regulations. The violations shown and the circumstances in which they occurred do not establish a persistent disregard for regulation. Rather, they appear to be the result in some cases of ignorance of the requirements, and in others of a degree of carelessness and not willfulness. *The principals are youthful and are of such caliber that their experiences at the hearing herein can be expected to make them more conscious of and responsive to regulation.* They earnestly deny that what has been done in respect of Gilbertville and Nelson amounts to effectuation of control in a common interest and on this record their view on that point cannot be said to be wholly groundless. Such control is not the result of any one act or transaction, but is the result of an evolution and a cumulation of acts, transactions and practices, the ultimate consequence of which may not be readily obvious to the layman. *A finding of unfitness by reason of violations is not warranted.*" (p. A-72, *infra*) (Emphasis added.)

Division 4, by a two-to-one decision, also held that section 5(4) had been violated, although it never even cited the presumptions of sections 5(5) and 5(6); instead, Division 4 based its "finding in this respect . . . on the entire chain of circumstances revealed by the record." (75 M.C.C. at 53) Ignoring the Examiner's finding of fact that the applicants were not unfit (although it had adopted the Examiner's factual statements "as our own" (75 M.C.C. at 46)), Division 4 denied the section 5(2) application be-

cause "a violation of the law should not be rewarded, . . . existing carriers endeavoring faithfully to comply with the law should be encouraged and protected" and "violations of the law and of the regulations should not be 'blessed' by approval". (75 M.C.C. at 54) Division 4 ordered that the respondents "terminate the violation of the provisions of section 5(4)". (Complaint, App. F at 18; R. 3, 60)

The Commission recalled the proceedings from Division 4 after they were reopened on appellants' petition for reconsideration. In the resulting Report, to which four of the eleven Commissioners agreed,² the Commission relied upon the conclusive presumptions of sections 5(5) and 5(6):

"Considering all the facts of record, we are of the opinion, and find, that Kenneth Nelson was affiliated with Nelson [Co.] within the meaning of section 5(6) at the time he purchased the stock of Gilbertville [Co.] and that the conclusive presumption of section 5(5) applies; we affirm the findings in the prior report, and in the report of the examiner, that the control and management of Nelson [Co.] and Gilbertville [Co.] in a common interest has been effected and is continuing in violation of section 5(4) of the act." (80 M.C.C. at 264-65) (Emphasis added.)

Then the Commission, adopting the language used by Division 4, denied the section 5(2) application solely because it inferred "unfitness" from the violation of section 5(4) it had conclusively presumed. (80 M.C.C. at 265-66) However, the Commission's order not only reinstated

²Four of the eleven members of the Commission constituted the majority; another concurred only in the result. Three Commissioners dissented and another who had dissented from the decision of Division 4 was among the three who did not participate in the full Commission's decision.

all the terms of Division 4's order, including the requirement that the respondents "terminate the violation of section 5(4) of the Interstate Commerce Act," but also

"*further ordered*. That the said respondents be, and they are hereby, required to divest themselves of any and all interest which they may have in the capital stock of Gilbertville Trucking Co., Inc. . . ." (Complaint para. 1 & App. B; Answer para. 1; R. 3).

The Report of the Commission contains not a single word of justification or explanation of that action.

After both a petition for reconsideration and a petition suggesting an alternative to the divestiture ordered had been summarily denied by the Commission, the appellants filed their Complaint seeking judicial review by the United States District Court for the District of Massachusetts, whereupon, on appellants' petition, the Commission postponed the effective date of its order. The appellants urged in the District Court, as they had urged before the Commission, that the Commission's decision was inconsistent with the relevant provisions of both the Administrative Procedure Act and the Interstate Commerce Act and wholly without support either by adequate basic findings or by substantial evidence on the whole record.

The District Court rejected each contention: First, after making certain *de novo* findings of fact in what it called a "syllabus", the District Court copied from defendants-appellees' brief "in full the essential portion of the text" of the Commission's Report "with the supporting transcript references conveniently supplied by defendants": (196 F. Supp. at 356). The District Court held that the Commission made sufficient findings and that the Commission's statements were "supported by evidence" (196 F. Supp. at 359). Secondly, appraising its *de novo* findings

of fact as well as the Commission's statements, the Court held that the ICC's ultimate conclusion that section 5(4) was violated is "inevitable to an unprejudiced, sophisticated mind" and affirmed that ultimate conclusion. (196 F. Supp. at 360) But, although the Commission had relied upon the conclusive presumptions of sections 5(5) and 5(6), the District Court's "reasoning does not . . . require resort to any legislatively enacted definitions or presumptions." (196 F. Supp. at 360) Finally, according to the District Court, no findings or reasoning were necessary to support the divestiture order, and denial of the section 5(2) application merely because a section 5(4) violation had been found was "a clearly proper exercise of a delegated discretionary authority." (196 F. Supp. at 362)

The significant basic facts are stated hereinafter where they are relevant to the showing that the questions presented by this appeal are substantial.

THE QUESTIONS ARE SUBSTANTIAL

The new and unusual rules of law invoked by the Commission in the present case required the District Court to explore virgin territory in the Interstate Commerce Act. But, because the Commission completely failed to blaze its trail with the required basic findings and reasons neither the parties nor the reviewing courts can know exactly what path the Commission took through that virgin territory. Confronted with a decision that was thus, as a practical matter, unreviewable, the District Court ignored its role of judicial review and its attendant responsibilities. Instead of remanding the case to the Commission for compliance with the requirements of the Interstate Commerce Act and the Administrative Procedure Act, as numerous decisions of this Court, such as *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, required it to

do, the District Court found new basic facts of its own, contrary to the facts found by the Commission, found its own new ultimate fact, evolved its own legal theories, and then, ironically, purported to affirm the Commission's result.

Three areas of the Commission's decision were thus unreviewable and unreviewed: First, the Commission invoked the rarely used conclusive presumptions of sections 5(5) and 5(6) of the Interstate Commerce Act, but it gave no indication of what "relationship" it had found as a fact upon which to base those conclusive presumptions. But by deciding the case on different grounds which did not involve sections 5(5) and 5(6), the District Court failed to review the important questions of what "relationship" the Commission had found and of whether that "relationship" was sufficient to invoke the presumptions. Second, although a continuing violation of section 5(4) is a prerequisite to the Commission's jurisdiction pursuant to section 5(7) of the Interstate Commerce Act to order remedial action, the Commission imposed a remedial order without having made any adequate finding that any violation was continuing. Third, the Commission not only ordered remedial action, but it imposed the most drastic remedy known - complete divestiture. Yet the Commission said nothing to justify the divestiture order and does not appear even to have considered whether it was necessary. The District Court, claiming support only by misconstruing this Court's recent decision in *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316, swept aside the requirement of both the express words of section 5(7) and many decisions of this Court that divestiture not be ordered unless and until it be found necessary.

The Commission in two ways extended and changed its doctrine (which had never been sustained by any court even in its original form) that "fitness" is a criterion to

be considered in section 5(2) proceedings for approval of proposed mergers. Disregarding the Interstate Commerce Act and the national transportation policy, the Commission promoted its "unfitness" doctrine to the status of an absolute rule requiring denial of a section 5(2) application even if the proposed merger would be in the public interest. And then *sub silentio* extending that "fitness" doctrine beyond the bounds of reason, the Commission held that any violation of law, however innocent, equals "unfitness".

Finally, not only is the record without substantial evidence to support the Commission's findings and decision, but the District Court did not even purport to find the Commission's decision or findings supported by substantial evidence on the whole record.

A. *The District Court did not review the Commission's decision; instead, disregarding the rule of the first Cheney case, it decided the case de novo.*

The court below abdicated its responsibilities pursuant to section 10 of the Administrative Procedure Act; it stepped down from the bench of a reviewing court and usurped the factfinding and decision-making functions committed by Congress to the Interstate Commerce Commission. Instead of reviewing the Commission's decision, the District Court based its decision in the present case upon grounds entirely different from those relied upon by the Commission. In this respect the District Court's decision is squarely contrary to the principle enunciated by this Court in *Securities and Exchange Commission v. Cheney Corp.*, 318 U.S. 80, and reiterated frequently, see, e.g., *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, that "the grounds upon which an administrative order must be judged are those upon which the record discloses

that its action was based." (318 U.S. at 87; see 363 U.S. at 270)

Nor is the District Court's decision justified because it reached the same result as the Commission had reached and therefore purported to affirm the Commission. This Court made clear in the *Chenery* case that a reviewing court may not affirm an administrative agency's decision on grounds different from those relied upon by the agency:

"In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' . . . But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." (Emphasis added.) 318 U.S. at 87-88; see *National Labor Relations Board v. Lundy Mfg. Corp.*, 286 F.2d 424, 426 (C.A. 2, 1960).

The failure of the District Court in the present case to confine its "review to a judgment upon the validity of the

grounds upon which the Commission based its action" is clear. Indeed, the basic facts, the ultimate fact, and the legal theory upon which the District Court predicated its decision were all different from those relied upon by the Commission.

1. The basic facts considered by the District Court were so different from those upon which the Commission had based its decision that the District Court really decided a hypothetical case of its own making instead of the case presented to it for review. The District Court created these differences in two ways: (a) it in effect overruled a number of the Commission's findings of fact on crucial matters and substituted new findings of its own which were contrary to or inconsistent with the findings of the Commission; and (b) it rejected as "trivial to the point of demonstrable irrelevance", "innocent" and "ambiguous" some of the facts upon which the Commission had relied.

(a) The District Court began its discussion of the present case by setting forth in what it called "a syllabus" the basic facts it deemed most significant. (196 F. Supp. at 356) More than half of the statements in that "syllabus" are demonstrably inconsistent with the facts found by the Commission.³

First, the "syllabus" "shows a close business relationship between Kenneth A. H. Nelson, his mother, and her six other children" by saying, "Originally they were all associated as shareholders in the Nelson Co." But the Commission had found (in accordance with the undisputed evidence) that three of the seven children became shareholders only when "Mrs. Nelson died in 1950 and her

³ Because so many of the District Court's findings of fact in the "syllabus" were inconsistent with the Commission's findings, however, the brevity appropriate to this Statement does not permit discussion of all such findings.

stock . . . was devised, 42 shares each". (80 M.C.C. at 263; see Pl. Ex. A Tr. 30-32,⁴ R. 2, 60)

Second, the "syllabus" finds, "In 1952 Kenneth was still the owner of 92 of the 500 shares of the Nelson Co." The undisputed evidence, however, showed not only that Kenneth at no time owned more than 50 shares of Nelson Co. stock, but also that Kenneth owned *no* such stock at any time in 1952; on September 22, 1951 Kenneth sold all Nelson Co. stock he then owned (50 shares) and contracted to sell at an established price the 42 shares which he expected to receive from his mother's estate; on January 24, 1953, when the estate was distributed, the stock was delivered to Kenneth's vendee pursuant to the contract to sell. And the Commission so found. (80 M.C.C. at 263; see Pl. Ex. A Tr. 32-33A, 36-38, 43-44, R. 2, 60)

Third, the "syllabus" contradicted the Commission when it found "At four . . . terminals [other than the New York terminal], . . . Gilbertville Co. was a sublessee of Nelson Co.", whereas the Commission correctly found such subleases at only three terminals other than New York, to wit, at "Rockville-Ellington, Newton, Mass., and Woonsocket, R.I." (80 M.C.C. at 263)

Fourth, the "syllabus" makes some remarkable assertions about Kenneth's eighteen-month long career

"as a 'tariff consultant.' The nature of this relationship and of this work is not precisely shown. Kenneth claims he held himself out not as an employee or officer but as an independent contractor; yet if he had clients other than Nelson Co. they were not shown. Moreover, in his work for Nelson his duties (properly

⁴Inasmuch as the entire record of proceedings before the Commission was marked as one exhibit (R. 60), citations to the portion of that exhibit constituting the transcript of testimony before the Commission's Examiner are denoted herein by the abbreviation "Tr."

inferable from his title, his rate of compensation, and miscellaneous specific minor incidents,⁵) trench upon administrative or executive rather than strictly independent professional advisory functions."

Those assertions flatly contradict the Commission's finding that during the eighteen-month period Kenneth was "a 'free lance' tariff consultant". (80 M.C.C. at 263) The District Court not only deleted, but also completely ignored, the Commission's finding that Kenneth was "free lance". Although the term "free lance" may be colloquial, its meaning is clear; by using the adjective "free lance" the Commission unambiguously found that Kenneth was an independent contractor.⁶ Moreover, the profession of "tariff consultant" is an established one,⁷ well known within

⁵ But the record contains neither any finding nor even any evidence of any "specific minor incidents" while Kenneth was a free lance tariff consultant. And the record does show, by uncontradicted evidence, that Kenneth had no "rate of compensation"; like any other independent professional, Kenneth was paid when, from time to time, he rendered statements for his fees. (Pl. Ex. A Tr. 181; R. 2, 60) Inasmuch as "his title" shows that Kenneth was exactly an "independent professional" advisor, it is plain that whatever "inference" the District Court may have made was without any basis in fact and could have been no more than imagination. Moreover, it is typical of the vagueness of the District Court's opinion that, despite the assertions as to Kenneth's duties being "inferable" and as to what they "trench upon", there is no indication of what the District Court imagined those duties to have been. The characterizations, apparently borrowed from the wage and hour law (see 52 Stat. 1067 (1938), 29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.1, 541.2, 541.3), are not illuminating.

⁶ That finding was required by the uncontradicted evidence. For example, a public accountant who was one of the witnesses described Kenneth as "an independent, just the same as myself, . . . who holds himself out to do a certain classified work". (Pl. Ex. A Tr. 28, 270; R. 2, 60) Moreover, the title "consultant" also shows that Kenneth was an independent contractor. See, e.g., *State v. E. J. Doyle & Co.*, 96 Atl. 605, 610 (R.I. 1916); *Gulf & Southern Transportation Co., Inc.*, — Extension — Century, Florida, 71 M.C.C. 1, 2 (1957).

⁷ For example, there is a separate listing "tariff consultants" in the Classified Section of the Washington, D.C. telephone directory. And

the transportation industry where the Commission is expert; the Commission was no more required to explain what a free lance tariff consultant does than the District Court was required to elaborate upon the title "a public accountant", which it used in its "syllabus". And, even if the Commission had erred in failing to define "a free lance" tariff consultant", such an error would not have given the District Court license to speculate.

The District Court's assertions about Kenneth's career as a free lance tariff consultant are inconsistent with the Commission's findings in still another respect. For the obvious contradictions of the Commission's finding that Kenneth was a free lance tariff consultant are just the wool which the District Court threaded through the warp of an erroneous view of the burden of proof in weaving the fabric of those assertions. The warp may be seen in the statements that certain things "were not shown", wherefore (the District Court patently has inferred) the facts if shown would have been harmful to the appellants. That inference by the District Court is necessarily inconsistent with the facts as the Commission viewed them, for section 7(c) of the Administrative Procedure Act specifies that "the proponent of a rule or order shall have the burden of proof." The ICC was the proponent in the investigation proceeding, and Commission counsel even conceded that the Commission had the burden of proving that Kenneth did not have other clients (if that had been the fact) (R. 38).⁸ Therefore when the Commission viewed the facts it

even defendants' counsel admitted, "we know there is such a thing as a tariff consultant; some lawyers are called tariff consultants." (R. 31) A tariff consultant is understood in the industry to be an independent professional who holds himself out as an expert on the rates which are to be charged, auditing freight bills of shipper-clients in search of overcharges which may be recovered and advising carrier-clients what rates should be charged.

⁸ A similarly erroneous inference based upon the District Court's misapprehension as to the burden of proof is evident in the "syllabus"

must have drawn the opposite inference—that facts not shown were consistent with the innocence of the appellants.

Fifth, the "syllabus" finds in a few words of ambiguous testimony which obviously were discredited by the Commission's evidence that "some of the services" of Kenneth as a free lance tariff consultant for his client Nelson Co. "were performed after Kenneth's acquisition of the stock of Gilbertville Co. (Tr. 427), that is, after March 2, 1953." And that finding, together with the erroneous findings discussed as "Fourth" hereinbefore and another manifestation of the District Court's erroneous view of the burden of proof, forms the basis of the District Court's conclusion that section 5(4) was violated: "the whole convergence begins with the purchase of shares in a second company made by an individual at a moment when he is not shown to have severed a relationship to the arterial traffic nerve of the first company." (196 F. Supp. at 360) Yet the Commission

finding that "[s]ome items of expense are shared upon a set formula, not shown to be other than arbitrary." Although the word "some" is puzzling, "Some items of expense" apparently refers to the expense of leased telephone lines connecting those terminals in which both Nelson Co. and Gilbertville Co. are quartered, for the Commission's Report refers to no other "shared" expense. There was not any evidence, or even any suggestion, that the apportionment was disproportionate, and the ICC clearly would have had the burden of proving the apportionment questionable.

The Commission's refusal to credit these few words was obviously correct. That the witness was only making a guess appears from the words "must have been" in the very statement the District Court relies upon and also from the witness' admitted lack of knowledge and confusion about the subject. (Pl. Ex. A Tr. 423-27; R. 2, 60) Moreover, his guess was based solely upon data concerning Kenneth's annual income (*id.* at Tr. 272-77), which, as Commission counsel conceded to the District Court (R. 34), do not justify any inference as to when work is performed. Because Kenneth was an independent professional, the time he received his fees depended upon when he rendered statements, not upon when he rendered services. It is significant that, whereas Kenneth was a free lance tariff consultant for four months in 1951, he received no fees in 1951.

expressly found that Kenneth was a free lance tariff consultant only until "March 1, 1953" that his career as a free lance tariff consultant stopped short of, and did not overlap, any connection with Gilbertville Co. (80 M.C.C. at 263). Even without regard to its misapprehension as to where the burden of "showing" lay, the District Court's action in holding that a crucial fact which was expressly found by the Commission was "not shown" but nevertheless affirming the Commission's decision is unmistakable evidence that the District Court usurped the Commission's function.

(b) The District Court correctly held that the Commission's findings in its Report included some matters which were "trivial to the point of demonstrable irrelevance" and "some innocent conduct, or conduct of ambiguous nature." (196 F. Supp. at 359-60). And the Commission expressly relied upon "all the facts of record" (80 M.C.C. 264), without indicating what weight it had attached to those matters which the District Court realized were "trivial", irrelevant, "innocent" and "ambiguous" except that the Commission's singling out such matters for special attention in its Report suggests that the Commission deemed them significant. The District Court was therefore required to remand the case to the Commission for reconsideration and decision without taking into account the matters which the District Court rejected as "trivial", irrelevant, "innocent" or "ambiguous". See *Communist Party v. Subversive Activity Control Board*, 351 U.S. 115; *Carey v. Civil Aeronautics Board*, 275 F.2d 518, 522 (C.A. 1, 1960); cf. *Colorado Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626, 634. In refusing to do so because it thought that "excision" or "deletion" of those matters would not change the Commission's ultimate conclusion, the District Court again usurped the Commission's functions and acted

squarely contrary to the admonition by this Court in the *Chenery* case that "a judicial judgment cannot be made to do service for an administrative judgment." (318 U.S. at 88)

2. The finding of ultimate fact and the legal theory upon which the District Court based its decision of the issue arising under section 5(4) were entirely different from those relied upon by the Commission. In the words of the *Chenery* case, the Report of the Commission in the present case plainly "discloses that its action [in finding a violation of section 5(4)] was based" upon the conclusive presumptions of sections 5(5) and 5(6): the Commission's conclusion after its lengthy factual recitation was that "we are of the opinion, and find, that Kenneth Nelson was affiliated with Nelson [Co.] within the meaning of section 5(6) at the time he purchased the stock of Gilbertville [Co.], and that the conclusive presumption of section 5(5) applies" (80 M.C.C. at 264). The District Court's opinion just as plainly discloses that the District Court did not judge the validity of the Commission's decision upon those grounds: the District Court specifically disclaimed reliance upon the grounds the Commission had used by stating, at the end of its discussion of the issue arising under section 5(4); "The foregoing reasoning does not . . . require resort to any legislatively enacted definitions or presumptions." (196 F. Supp. at 360)

The difference between the rationale of the District Court and the rationale of the Commission is fundamental. The conclusive presumptions of sections 5(5) and 5(6) were enacted to describe situations not otherwise comprehended by section 5(4). See, e.g., *Hearings on H.R. 9059 Before House Committee on Interstate and Foreign Commerce*, 72d Cong., 1st Sess. (1932) at 32-34; S. Rep. No. 87, 73d Cong., 1st Sess.

(1933) at 9-10. The District Court's ground of decision required it to make a finding of ultimate fact that control or management in a common interest had been effectuated, but the Commission's decision, using the conclusive presumptions of sections 5(5) and 5(6), involved a much different ultimate fact. To support its opinion . . . that Kenneth Nelson was affiliated with Nelson [Co.] within the meaning of section 5(6) at the time he purchased the stock of "Gilbertville" Co., the Commission must tacitly have found that as of that time there existed a certain "relationship" of Kenneth to Nelson Co.—a "relationship" as a result of which it would have been "reasonable to believe" that the affairs of any carrier of which Kenneth acquired control would be managed in the interest of Nelson Co. Because the District Court decided the case upon a different ground instead of reviewing the Commission in accordance with the principle of the *Chenery* case, that crucial finding of ultimate fact—that such a "relationship" then existed—has not yet been subjected to judicial review even though it was the keystone of the Commission's decision.

The District Court's *de novo* review is peculiarly repugnant to an orderly administrative process in the present case, for the result has been that the District Court has affirmed the Commission on a ground that the Commission itself had impliedly rejected. Division 4 decided the present case on essentially the same theory as that used by the District Court (although, as has been demonstrated, on different facts). On reconsideration, however, the Commission abandoned that ground and invoked instead the conclusive presumptions of sections 5(5) and 5(6). Thus the District Court's "affirmance" of the Commission is truly a usurpation, for it is upon a ground upon which the Commission itself was unwilling to decide the case.

B. *The Commission's decision contained neither findings nor reasoning adequate to satisfy the requirements established by Congress and this Court.*

The Commission's Report falls disgracefully short of the minimum standards of explication of its decision established by Congress and innumerable decisions of this Court. "There can be no doubt that the Administrative Procedure Act applies to proceedings before the Commission". *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 192. Section 8(b) of the Administrative Procedure Act requires all decisions to "include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record". (Emphasis added.) The Commission must at least tell the reviewing courts and the parties how or why and because of what basic facts it reached its conclusion. See *Beaumont, Sour Lake & Western Ry. Co. v. United States*, 282 U.S. 74, 86 (1930); cf. *Eastern Central Motor Carriers Association v. United States*, 321 U.S. 194, 212. "For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review." *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 94. "We must know what a decision means before the duty becomes ours to say whether it is right or wrong". *United States v. Chicago, M. St. P. & R. R. Co.*, 294 U.S. 499, 511. The "reviewing court cannot perform its proper function when the regulatory body has failed to make adequate exposition of the grounds for its action." *South Carolina Generating Co. v. Federal Power Commission*, 249 F.2d 755, 764 (C.A. 4, 1957), cert. denied, 356 U.S. 912.

The Commission's Report completely fails to articulate how or why the Commission resolved as it did three primary and fundamental issues in the present case. (1) The Report

does reveal that the Commission determined a violation of section 5(4), by means of the conclusive presumptions of sections 5(5) and 5(6), but it does not indicate what basic facts were found to prove the "relationship" which, as has been noted, is the ultimate fact which must be found to invoke those conclusive presumptions. (2) That a section 5(4) violation be continuing is prerequisite to the remedial jurisdiction of the Commission pursuant to section 5(7), and the Report contains no adequate finding of such a continuing violation. (3) For the Commission to order any remedy which it has not found "necessary" is unauthorized by section 5(7) and also, forbidden by many decisions of this Court. Yet the Commission has ordered Kenneth to sell the stock of Gilbertville Co. without any indication why divestiture is necessary or even that the Commission ever considered that question—indeed, without any explanation whatever of the divestiture order.

1. The Commission's Report contains only one clue to the reasoning underlying the Commission's decision that section 5(4) was violated, to wit, the ultimate finding "that Kenneth Nelson was affiliated with Nelson [Co.] within the meaning of section 5(6)". (80 M.C.C. at 264) Perhaps from that finding the parties and the courts may infer that somehow the Commission found as an ultimate fact the critical "relationship" which section 5(6) would make the basis of a conclusive presumption of such affiliation—a "relationship" between Kenneth and Nelson Co., existing at the time Kenneth purchased the stock of Gilbertville Co., as a result of which it would have been "reasonable to believe" that the affairs of any carrier of which Kenneth acquired control would be managed in the interest of Nelson Co.

But the basic facts necessary to support an ultimate finding of such a "relationship" may not be inferred. *New York Central R. Co. v. United States*, 99 F. Supp. 394, 401 (D. Mass. 1951), affirmed, 342 U.S. 890. Nor can those facts

be found in the Commission's Report. Although almost two printed pages of the Report (80 M.C.C. at 263-64) are devoted to recitation of a motley collection of facts, nowhere in the Report is there any indication of what basic fact or facts (if any) on those two printed pages the Commission thought proved the requisite "relationship". Certainly no relevant "relationship" is recited there. To the contrary, express findings of fact in those two printed pages show that the only two kinds of possible "relationship" which had ever existed had ended before Kenneth even signed the contract to buy the stock of Gilbertville Co. on March 2, 1953; Kenneth "resigned from the business" of Nelson Co. and sold his stock in September 1951, and the connection between Kenneth as a free lance tariff consultant and Nelson Co. as a client of his ended on or before March 1, 1953. (80 M.C.C. at 263; see Pl. Ex. A, Tr. 33-38, R. 2, 60; see also pp. 18-19, *supra*)

The essential principle violated by the Commission in the present case was stated succinctly ten years ago by Chief Judge Magruder, speaking for the very court from which the present appeal has been taken, in *New York Central R. Co. v. United States*, *supra* at 401, a decision which this Court affirmed:

"[A]n ultimate finding is not enough in the absence of a basic finding to support it . . . And these basic findings should be clearly stated and identified as such, so that the reviewing court will not be groping in the dark as to the grounds for the Commission's ultimate conclusion."

Moreover, even "groping in the dark" is fruitless (and somewhat frightening) in the present case. One of the facts which appears in those two printed pages is that Kenneth is a brother and half-brother, respectively, of the three

owners of Nelson Co. Has the Commission laid down a rule of law that a brother of the owners of a carrier is *ipso facto* "affiliated" with that carrier? If so, the appellants and the reviewing courts are entitled to know it. It is obvious, and the District Court held (196 F. Supp. at 359-60)

that these two printed pages include facts which are "trivial to the point of demonstrable irrelevance", "innocent" and "ambiguous". Were any of these facts the basis of the finding that "Kenneth Nelson was affiliated"? If so, the parties and the reviewing courts are entitled to know it. Indeed, inasmuch as the Commission based its ultimate finding that "Kenneth Nelson was affiliated" upon "all the facts of record", not only upon the facts stated in the Report, there cannot even be any certainty that the crucial facts are to be found anywhere upon those two printed pages.

The Commission's decision that Kenneth was affiliated with Nelson Co. within the meaning of section 5(6) is therefore unreviewable.

"These findings are far too vague and scanty to explain what facts the ICC found, what legal conclusions it drew from these facts, and why. *There is no sufficient bridge between the narrative statement of facts and the ultimate determination of no undue prejudice.* This Court can have no way of reviewing the administrative conclusions. *We do not know how the facts were appraised or how the various factors were weighed and balanced.* We cannot say whether the result was arbitrary or was a proper exercise of administrative judgment." *Stanislaus County v. United States*, N.D. Cal. C.A. 7834, decided December 12, 1960.¹⁰

¹⁰ Because the opinion in *Stanislaus County v. United States* is unreported, appellants will lodge a certified copy of that opinion with the Clerk of this Court when this Jurisdictional Statement is filed.

In the present case the unknown "relationship" is the foundation of all the Commission's reasoning, which appears to have been essentially as follows: "relationship" exists, therefore section 5(6) applies; because section 5(6) applies section 5(5) applies; because section 5(5) applies section 5(4) was violated; because section 5(4) was violated section 5(2) application is denied *and* divestiture is ordered. Therefore the lack of support of the conclusion of "relationship" by the necessary basic findings and reasons impeaches the entire Commission decision. Because the finding of "relationship" the foundation of the stack of presumptions and rules of law—must collapse, the whole stack of presumptions and rules must topple and fall like a stack of children's blocks.

Decisions thus devoid of any reasoning and clearly unreviewable must be set aside, lest they become the breeding grounds for slovenly work and arbitrary results. See, e.g., *New York v. United States*, 342 U.S. 882, 884 (Douglas, J., dissenting); *Saginaw Broadcasting Co. v. Federal Communications Commission*, 96 F.2d 554 (D.C. Cir. 1938), cert. denied, 305 U.S. 613. Yet in the present case the District Court did not set aside the Commission's decision, or even criticize it; instead, the District Court discussed the obligations of "a fact-finder [who] has the talent of Justice Holmes". (196 F. Supp. at 359)⁴¹ However, neither that discussion nor the District Court's reference to some

⁴¹ The reference to Mr. Justice Holmes is only pertinent if the District Court meant to imply that the Commission has "the talent of Justice Holmes". Yet such an implication is incredible in light of the Commission's work in the present case and the opinions of other authorities as to the calibre of the ICC's work. See, e.g., *Inland Motor Freight v. United States*, 60 F. Supp. 520, 525 (E.D. Wash. 1945), where the court observed that "the Commission's reluctance to make definite and detailed findings is strikingly apparent in this case." And in his recent "Report on Regulatory Agencies to the President-Elect,"

supposed danger of causing "agency heads, judges, and others . . . to delegate more than they now do to anonymous law clerks" (196 F. Supp. at 359) is even colorable justification of the disregard of the Administrative Procedure Act and the decisions of this Court shown by the Commission in failing to articulate what "relationship" it found to exist and by the District Court in refusing to set aside the Commission's decision because of that failure.¹²

2. In ordering the respondents to do various things and, in particular, ordering Kenneth ~~to~~ dispose of the stock of Gilbertville Co., the Commission purported to act pursuant to section 5(7) of the Interstate Commerce Act. Section 5(7) grants to the Commission in certain circumstances a limited power to remedy violations of section 5(4):

"If the Commission *finds* after such investigation that such person *is violating* the provisions of such paragraph [section 5(4)], it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, *to prevent continuance* of such violation." (Emphasis added.)

James M. Landis stated (p. 39): "Opinions of the Interstate Commerce Commission are presently in the poorest category of all administrative agency opinions. Their source is unknown and the practice has grown up of parsimony in discussing the applicable law in making a determination. Lengthy recitals of the contentions of the various parties are made as a prelude to a succinct conclusion devoid of any real rationalization."

¹² The District Court also cited *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-94. In that case, however, this Court excused the Commission from its duty to make clear basic findings of fact and statements of reasons only as to certain irrelevant contentions of an intervenor—"contentions that are so collateral or immaterial that the law did not require specific findings upon them." (361 U.S. at 193.) The "relationship" involved in the present case—upon which an assertion of violation of section 5(4), a denial of a section 5(2) application and a decree of divestiture are all based—can hardly be called either "collateral" or "immaterial."

The language of section 5(7) only authorizes the Commission to prevent farther continuance of a continuing violation; it does not permit the Commission to punish, redress, or otherwise remedy a violation which is *fait accompli*. In other words, whereas section 5(4) forbids both effectuation and maintenance of control or management in a common interest, Congress drew a distinction, particularly for remedial purposes, between the effectuation of such control or management (necessarily a single act or series of acts) and maintenance or continuance of such control or management after it has been effectuated, see H.R. Rep. No. 193, 73d Cong., 1st Sess. (1933) at 16, 17, and restricted the Commission's remedial power pursuant to section 5(7) to termination of continuing violations of the latter type. See S. Rep. No. 87, 73d Cong., 1st Sess. (1933) at 9, 10.

It cannot be doubted that section 5(7) thus raises a material issue of fact within the meaning of section 8(b) of the Administrative Procedure Act—whether the violation is continuing—and therefore section 8(b) requires “findings and conclusions, as well as the reasons or basis therefor,” upon that issue. But in the present case there is no adequate finding that any violation is continuing.

Sections 5(5) and 5(6) of the Interstate Commerce Act, upon which the Commission based its decision, provide for conclusive presumptions only of effectuation of control or management in a common interest and not of maintenance or continuation of such control or management. Nor can the assertion of continuance which is part of a formal recitation of section 5(4) violation in the Commission's Report (80 M.C.C. at 266) satisfy the requirement for findings. *Florida v. United States*, 282 U.S. 194, 213; *Atlanta & Saint Andrews Bay Ry. Co. v. United States*, 104 F. Supp. 193 (M.D. Ala. 1952). The only other reference to continuance is found in the conclusion “we affirm the find-

ings in the prior report, and in the report of the examiner, that the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing" (80 M.C.C. at 264-65). Seeking then for the affirmed "findings", the only explicit statement that may be found in Division 4's Prior Report is "[w]e concur in the examiner's conclusion that Nelson and Gilbertville are controlled or managed in a common interest" (75 M.C.C. at 53) and the relevant statement in the Examiner's Report is that "control and management in a . . . common interest . . . presumably are being maintained" (p. A-69, *infra*; accord, p. A-63, *infra*) (Emphasis added.) In other words, the Examiner was unable to find, on the basis of evidence pertaining to the years 1953 through 1955 which he heard in 1956, that such control and management were being maintained even in 1956.

Thus the Commission's Report does not contain even an adequate conclusion of a continuing violation, much less the basic findings adequate to support such a conclusion. The Commission's claims to have considered "the evidence" and "all the facts of record" are not sufficient substitutes for the required findings. *Beaumont, Sour Lake & Western Ry. Co. v. United States*, 282 U.S. 74, 86; *Atlanta & Saint Andrews Bay Ry. Co. v. United States*, 104 F. Supp. 193 (M.D. Ala. 1952). Nor will the missing findings be supplied by the courts.

"This Court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained. *Florida v. United States*, 282 U.S. 194. Recently this

court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication." *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 295 U.S. 493, 201-02; see also *Inland Motor Freight v. United States*, 60 F. Supp. 520, 524 (E.D. Wash. 1945).

Due to the absence of these required findings, the Commission had no jurisdiction pursuant to section 5(7) to issue any remedial order.

3. Section 5(7) of the Interstate Commerce Act only authorizes the Commission to order "such action as may be *necessary*, in the opinion of the Commission, to prevent continuance of such violation." Thus section 5(7) presents another material issue of fact, law or discretion within the meaning of section 8(b) of the Administrative Procedure Act—whether the divestiture which was ordered was necessary to prevent continuance of such violation—and the Commission was required by section 8(b) to state its "findings and conclusions, as well as the reasons or basis therefor" upon that issue of necessity. But the Commission gave no indication as to why divestiture may have been thought necessary or even why it was ordered. There is not even any indication that the Commission ever considered whether the divestiture ordered was necessary.

The Commission's failure to articulate its reasons for ordering Kenneth to dispose of the stock of Gilbertville Co. is contrary to numerous decisions of this Court. For example, in *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, this Court insisted that the Board demonstrate that it had exercised its discretion and explain why it had ordered the remedy it did. And in *Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, this Court refused to sustain a cease-and-desist order because "we are left in the dark whether some [less drastic remedy] . . .

would in the judgment of the Commission be adequate." (527 U.S. at 613) See also *Communications Workers of America v. National Labor Relations Board*, 332 U.S. 479; *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426.

This Court has insisted upon a showing and findings of necessity as a prerequisite to a divestiture order even in antitrust cases. *Hughes v. United States*, 342 U.S. 358. In *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 602-603, the majority of the Court held:

"Since divestiture is a remedy to restore competition and not to punish those who restrain trade, it is not to be used indiscriminately, without regard to the type of violation or whether other effective methods, less harsh, are available. That judicial restraint should follow such lines is exemplified by our recent rulings in *United States v. National Lead Co.*, 332 U.S. 319, where we approved divestiture of some properties belonging to the conspirators and denied it as to others, pp. 348-353. While the decree here does not call for confiscation, it does call for divestiture. I think that requirement is unnecessary.

See also *United States v. General Electric Co.*, 415 F. Supp. 835, 871 (D.N.J. 1953).

The principle that divestiture not be ordered unless and until it has been found necessary is particularly important in the context of the Interstate Commerce Act, not only because the Commission's power pursuant to sec. 1(7) is expressly limited, but also because of the ambivalence peculiar to the national transportation policy. The Congressional purpose underlying the whole of section 3 of the Interstate Commerce Act is to promote merger and consolidation, not divestiture and dispersal in the national

transportation system. See *County of Marin v. United States*, 356 U.S. 412, 416-18. That policy and the abiding Congressional concern about divestiture orders revealed by the legislative history of the Interstate Commerce Act¹³ require that the drastic remedy of divestiture be used most sparingly.

The District Court's attempt to justify the divestiture order and to excuse the Commission's failure to make the required finding as to necessity was a ruling that as a matter of law in any case involving an unlawful acquisition of control a divestiture order may be entered without regard to other circumstances:

"Indeed, when the I.C.C. has found that an offender has unlawfully acquired control of a carrier and continues to hold the acquisition, an order of divestiture has a fitness so perfect that the order not merely is obviously a suitable exercise of discretion, but needs no gloss.

"..... [N]o tribunal is called on to write an essay
....." (196 F. Supp. at 361, 362)

In that one bold stroke, the District Court swept aside the requirements of the Administrative Procedure Act, the Interstate Commerce Act and the decisions of this Court.

¹³ In 1932 it was proposed that the ICC be given power to order divestiture when control of a carrier was held without consent of the Commission if (and only if) that control tended to defeat the national consolidation plan, see *Hearings on H.R. 9059 Before House Committee on Interstate and Foreign Commerce*, 72d Cong., 1st Sess. (1932) at 19, 36, but even that very limited provision was weakened so as merely to provide for divestment of voting power, see H.R. Rep. No. 193, 73rd Cong., 1st Sess. (1933) at 23, 24. The weakened provision was then deleted from the Interstate Commerce Act in 1940 because it had been necessary only to protect the nationwide plan of consolidation administered by the Commission and it became unnecessary when the concept of such a plan was abandoned. See H.R. Rep. No. 1217, 76th Cong., 1st Sess. (1939) at 28.

The District Court sought support for its action in the recent decision of this Court in *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316. But the *duPont* decision does not justify an absolute rule of divestiture without regard for necessity, even in the context of the Clayton Act; in *duPont* this Court ruled only that divestiture should be imposed "if the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief". (366 U.S. at 327). This Court recognized that "hardship can influence choice . . . among two or more effective remedies", not only by saying so, but also by considering at great length the very question the Commission ignored in the present case—whether complete divestiture was necessary. (366 U.S. at 331-34)

No necessity for divestiture is apparent from the record in the present case. Section 5(4) was violated, according to the Commission, because Kenneth is presumed, pursuant to section 5(6), to have been affiliated with Nelson Co. when he purchased Gilbertville Co. There is no possible reason why severance of Kenneth's connections with either carrier would not be a fully effective remedy. Thus it would have been entirely sufficient "to prevent continuance of such violation", to order Kenneth and Nelson Co. to terminate whatever "relationship" the Commission found to exist and or to enjoin control or management in a common interest (as both Division 4's order and one paragraph of the Commission's order actually did). Cf. *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 400-01 (S.D.N.Y. 1957), affirmed 250 F.2d 524 (C.A. 2, 1958). Such an alternative remedy would avoid the harsh results of a divestiture order, which are apparent on the record, such as requiring Kenneth to sell, almost inevitably at a "fire sale" price, all of the stock of the corporation in which he has invested eight and a

half years of his life and large amounts of money and whose business, as the District Court found, had "flourished under . . . [his] direction and ownership". (196 F. Supp. at 356)

Moreover, pursuant to the express language of Section 5(7), rationalization of the ordered divestiture as "necessary", if it can be so rationalized, was for the Commission, not for the District Court. *Florida v. United States*, 282 U.S. 194, 215 (1931). The District Court erred in failing to remand the case to the Commission for a "clear indication that it has exercised the discretion with which Congress has empowered it". *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 94, quoting *Philips Dodge Corp. v. National Labor Relations Board*, 313 U.S. 197, and that it "has given consideration to all of the criteria which Congress has required to be taken into account in determining the question before it". *Seafair Lines, Inc. v. United States*, 168 F. Supp. 819, 826 (S.D.N.Y. 1958); see *Sulzberg v. United States*, 176 F. Supp. 867 (S.D.N.Y. 1959); *Cantlay & Tanzola, Inc. v. United States*, 115 F. Supp. 72 (S.D. Cal. 1953); *Matter of United Corp.*, 249 F. 2d 168, 179-81 (C.A. 3, 1957).

C. *The Commission's denial of the merger application was based solely upon two erroneous rules of law created by the Commission in the present case.*

In section 5(2)(c) of the Interstate Commerce Act, Congress directed the Commission, "in passing upon any proposed transaction, under the provisions of" section 5(2), to "give weight to . . . [certain] considerations, among others". The Commission, by its decisions, has added to the criteria prescribed in section 5(2)(c) another consideration, usually called "fitness" of the applicants. Under the aegis of its "fitness" criterion, the Commission has

frequently taken willful violations of law into account when considering section 5(2) applications and has sometimes denied such applications because lack of "fitness" demonstrated by such violations was not outweighed by the potential benefit of the merger to the public interest and other like factors. Although no Commission denial of a section 5(2) application based on such "unfitness" has ever been sustained by the courts, appellants do not question (and they assume for purposes of argument) that the Commission may properly consider a willful violation of law as one factor "among others" bearing on whether a section 5(2) application should be granted.

In considering the proposed merger of Gilbertville Co. and Nelson Co., the Examiner applied the criteria set forth in section 5(2)(c) as well as the Commission created "fitness" criterion. He found that the proposed merger would be in the public interest and would result in a sounder common carrier and achieve substantial savings without adverse effects upon employees or competition, that the applicants were not "unfit" because section 5(4) had been violated, and that the section 5(2) application should be granted. (pp. A-72-A-79, *intra*) The Commission never questioned the correctness of the Examiner's findings concerning the criteria of section 5(2)(c); it never even considered those criteria. Instead, the Commission denied the section 5(2) application on the sole ground that section 5(4) had been held violated.

In denying the section 5(2) applications in the present case, the Commission made two new and clearly erroneous rules of law: it said that "unfitness" comprised of a violation of law requires denial of a section 5(2) application, regardless of whether or not the proposed merger is otherwise in the public interest; and it held, *sub silentio*, that any violation of law, however innocent, equals such "unfitness".

1. Until it decided the present case the Commission had consistently treated its "fitness" criterion as merely one factor to be weighed together with the public interest and the other factors specified by section 5(2)(c) in considering a section 5(2) application. As the Commission's Report stated, "the views *heretofore* followed, [were] that law violations are not necessarily a bar to approval of an application, if the public interest will best be served by approval of the transaction presented." (80 M.C.C. at 265) (Emphasis added.) Section 5(2) applications have been granted by the Commission despite blatant violations of law, e.g., *Otto L. Hankison-Control-Mutual Trucking Co.*, 37 M.C.C. 617 (1941), and (such approvals have been affirmed by the courts, e.g., *Baltimore Transfer Co. v. Interstate Commerce Commission*, 114 F. Supp. 558 (D. Md. 1953), affirmed, 346 U.S. 890. Thus the Examiner's determination that the proposed merger of Glieberville Co. and Nelson Co. should be approved was based upon a weighing of the section 5(4) violation he had found and the other criteria. But the Commission renounced this weighing process and made its "fitness" criterion conclusive. "Now," says the Commission (by adopting the words of Division 4), "after more than 20 years of regulatory experience," "paramount, public interest" can no longer warrant granting a section 5(2) application when a "law violation" has been found; now the controlling principles, instead of public interest, are "that a violation of law should not be rewarded and that existing carriers endeavoring faithfully to comply with the law should be encouraged and protected." (80 M.C.C. at 266)

The District Court simply ratified the Commission's action:

¹⁴ The weighing process was renounced over the protests of one Commissioner who concurred only in the result and at least the two dissenters who expressed their opinions. (80 M.C.C. at 266-67)

"Under some imaginable circumstances, to have granted the merger application might conceivably be in the public interest. But to deny the application to formalize and strengthen a relationship already in part achieved by unlawful conduct is a clearly proper exercise of a delegated discretionary authority." (196 F. Supp. at 362).

Yet what the Commission did in the present case was to discard, apparently on grounds of obsolescence "after 20 years", both the mandatory criteria of section 5(2)(c) and the national transportation policy. In section 5(2)(b) Congress specified that "the Commission shall give weight to" four listed considerations; undoubtedly the Commission is entitled to consider its "fitness" criterion, but it is required also to consider the other three Congress deemed important. Moreover the national transportation policy of merger and consolidation which Congress intended the whole of section 5 of the Interstate Commerce Act to promote, *Opata of Mexico, United States*, 256 U.S. 412, 416, 18, is defeated by the Commission's new rule that no merger, however much in the public interest, will receive section 5(2) approval if there has been a violation of law.

The Commission had no "delegated discretionary authority" to disregard section 5(2)(c) and the national transportation policy. Rules adopted by the Commission must be "consistent with the statutory standards which govern its action", *Eastern United Motor Carriers Association v. United States*, 321 U.S. 494, 211. If section 5(2)(c) and the national transportation policy are obsolete it is for Congress to change them. The Commission did not even exercise the discretion it was given to "give weight to" all relevant considerations in "passing upon" section 5(2) applications. It renounced that discretion when it announced that "a showing of law violation" conclusive

ly bars granting of a section 5(2) application. By ignoring the mandatory criteria of section 5(2)(c) and the interests of the national transportation policy and concentrating on a single criterion, the Commission clearly erred. See, e.g., *Federal Communications Commission v. RCA Communications, Inc.*, 346 U.S. 86; *Cantlay & Taniguchi, Inc. v. United States*, 115 F. Supp. 72 (S.D. Cal. 1953).

2. Prior to the decision in the present case, "fitness" of applicants was a question of fact involving considerations of good faith and moral character. See, e.g., *Ethel R. Erick Control-Royal Blue Coaches, Inc.*, 56 M.C.C. 617 (1950). Applicants were not unfit to merge pursuant to section 5(2) because they had innocently violated section 5(4). E.g., *Masten Transportation, Inc. Merger Masten Trucking Co., Inc.*, 70 M.C.C. 421 (1957). But "unfitness" could not have been found as a fact in the present case; it appears to have been conclusively presumed.

The Commission made no finding of "unfitness" as a fact. Nor does the administrative record contain any substantial evidence of "unfitness". The record does contain, however, an express finding of the Examiner, who personally observed the applicants both in the hearing room generally and particularly on the witness stand, that the applicants are not "unfit", which finding is entitled to great respect. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 496; *Matter of United Corp.*, 249 F.2d 168 (C.A. 3, 1957).

In affirming the Commission's decision the District Court said, "Here the L.C.C. did no more than to refuse lawful unification to companies which it had found had precipitately and perilously effectuated a prohibited union without permission." (196 F. Supp. at 362) If that were so - if the Commission had found effectuation of control and management in a common interest as a matter of fact - the case might be different. But instead the Commission

held section 5(4) violated because "the conclusive presumption of section 5(5) applies" (80 M.C.C. at 264); and "the conclusive presumption of section 5(5)" became applicable because Kenneth was conclusively presumed to be affiliated with? Nelson Co. pursuant to section 5(6), which in turn means only that the Commission found it reasonable to believe certain facts. That it was reasonable for the Commission to believe certain facts does not imply any culpable or immoral conduct on the part of Nelson Co. or Gilbertville Co. or anyone else; it does not even imply that control or management in a common interest in fact existed at any time. In other words, sections 5(5) and 5(6) express only a Congressional determination that certain situations which are not otherwise unlawful involve a sufficient risk of control or management in a common interest that, even though such control or management does not exist, section 5(4) will be conclusively presumed to be violated. But Congress did not suggest that persons involved in situations comprehended by sections 5(5) and 5(6) are "unfit" for a merger pursuant to section 5(2).

The Commission's Report indicates that the Commission conclusively presumed "unfitness" from "a showing of law violation" (80 M.C.C. at 266). But, inasmuch as the "law violation" found in the present case, even if it were correctly found, means no more than that it is reasonable for the Commission to believe certain things, "unfitness" cannot rationally be inferred or presumed from the mere fact of "law violation".¹⁵ See, e.g., *Petition of Knight*, 122

¹⁵ Under the provisions of the Federal Aviation Act of 1958, sections 408 and 409, 49 U.S.C. §§ 1378 and 1379, which are closely paralleled to sections 5(2) and 5(4) of the Interstate Commerce Act, the Civil Aeronautics Board has placed importance upon the effectuation of unauthorized joint control in violation of the Acts, but it has carefully avoided equating such violations with automatic disqualification. See *Charles C. Sherman*, 15 C.A.B. 876 (1952); cf. *Atlas Corporation*, 21 C.A.B. 425 (1955).

F. Supp. 322 (S.D.N.Y. 1954) (naturalization examiner erred in finding lack of "good moral character" on basis of criminal conviction without considering contents of indictment, plea, verdict and sentence). This Court has long held that the legislature may not create presumptions without a rational basis. See, e.g., *Tot v. United States*, 319 U.S. 463. *A fortiori* an administrative agency must exercise its much more limited discretion in a rational manner. See, e.g., *Secretary of Agriculture v. United States*, 341 U.S. 645, 652-53; *Colorado Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626, 634; cf. *Shocher v. Board of Higher Education*, 350 U.S. 551; *Wieman v. Updegraff*, 344 U.S. 183.

D. *The District Court did not and could not find the Commission's decision or its findings supported by substantial evidence.*

The District Court held "that the statements of the I.C.C. are supported by evidence" (196 F. Supp. at 359), but it failed to find either the Commission's findings or its decision supported by "substantial evidence" on "the whole record" (Administrative Procedure Act, section 10(c)). That error was one of substance, not merely of semantics,¹⁶ for plainly the Commission's decision was not supported by substantial evidence, nor were a number of its findings.

The distinction between "evidence" and "substantial evidence" is clear: "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488. To be "substantial" the evidence must be "more than a mere scintilla. It

¹⁶ This error is also symptomatic of the District Court's failure to perform its function of judicial review. See pp. 12-21 *supra*.

means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 229. Accordingly, it must do more than create a suspicion of the existence of the fact to be established; . . . *Labor Board v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300. (340 U.S. at 477)

That the District Court ignored the distinction between "evidence" and "substantial evidence" appears not only from the phraseology of its holding, "supported by evidence", but also from the lack of any discussion underlying that holding. The District Court casually dismissed appellants' argument that the evidence was not substantial with nothing but a quotation from defendants-appellees' brief of "the essential portion of the text" of the Commission "with the supporting transcript references conveniently supplied by defendants", (196 F. Supp. at 356). It is evident that in copying those transcript references to "evidence" the District Court did not consider the other "evidence" cited by appellants, which (in the words of the *Universal Camera* case) "fairly detracts from its weight."

Most of the facts cited by the Commission in its "narrative statement" are so obviously innocent and irrelevant that no argument is necessary to show that those findings (even together with the evidence which allegedly supports them) cannot sustain the Commission's decision. Moreover, even a summary discussion of the evidence in a case as complicated as the present one seems neither appropriate to the purpose of this statement nor consistent with reasonable brevity. Appellants therefore offer here only a few brief comments upon two of the findings, in order to illustrate that the District Court could not have meant to hold the Commission's findings and decision supported by substantial evidence and that this appeal pre-

sents a substantial question as to whether the findings and decision were thus supported.

1. One of the Commission's findings, "the latter [Gilbertville Co.] constantly and frequently leases from a pool of equipment maintained by Nelson [Co.]", is supposedly supported by the following citations: "Tr., Solomon, 170; Chilberg, 524, 543-46; K. Nelson, 702-13, 819; Shea, 835-37, 844-46, 870; LaCour, 1023, 1029-31". (196 F. Supp. at 358) Substantiality of evidence is not a quantitative test, however; that thirty transcript pages are cited cannot compensate for the fact that the testimony those pages contain does not support the quoted finding.

The cited pages contain, together with much that is wholly irrelevant, testimony tending to prove only the following pertinent facts: During the period from the spring of 1953 to the summer of 1956 Gilbertville Co. from time to time leased vehicles from Nelson Co. if and when Nelson Co. was not using all of its vehicles. The only vehicles (if any) available for Gilbertville Co. to lease on any given day (if it wished to lease) were those (if any) left after Nelson Co. had satisfied all of its needs. The number of vehicles leased on any given day varied from none up to a maximum of six. Also, Gilbertville interchanged with about fifty other carriers; perhaps five per cent of its interchanging was with Nelson Co. But, although interchanging technically involves mutual leases, it is a concept entirely different from leasing. Interchange is an established practice of the trucking industry incidental to interlining of freight between two carriers: the carriers exchange (on a one for one basis) equipment laden with freight to be interlined for comparable equipment either empty or laden with other freight being interlined in the opposite direction. Gilbertville Co. and Nelson Co. used a form of lease in connection with interchange.

On the other hand, evidence *not* cited with respect to the

finding of a "pool of equipment" proves other very relevant facts: When Kenneth purchased the stock of Gilbertville Co. in 1953, it had little equipment (1 truck, 3 tractors and 4 trailers) and a capital deficit, and Gilbertville Co.'s operating revenue for the whole year 1953 was only \$75,489. By 1956, its operating revenue had grown to \$444,777 in the first seven months, or an average of more than \$63,500 per month. Meanwhile, Gilbertville Co. was increasing and upgrading its vehicle inventory as rapidly as possible: by July 31, 1956 Gilbertville Co. had 15 trucks, 12 tractors and 8 trailers, most of which it had purchased new. Gilbertville Co. was buying as many vehicles as it could afford as soon as it could afford them, but it had little capital to invest in equipment during that period of rapid expansion of its business. Leasing of equipment not only was a common industry practice but was permitted by the Commission. At the same time Nelson Co. frequently had much surplus equipment because Nelson Co.'s "particular line of specialized commodities, namely textiles, . . . has a very, very wide fluctuation of usage of equipment." (Pl. Ex. A Tr. 671; R. 2, 60) Indeed, Nelson Co. frequently had twenty tractors and twenty trailers standing idle (although Gilbertville never leased more than six units). (Pl. Ex. A Tr. 70, 236-37, 244-45, 408, 671, 718; Ex. 22, 23; R. 2, 3, 60; see p. A-48, *infra*) It is quite clear that leasing and interchanging equipment was both common in the industry and lawful and proper. See, e.g., *Railway Labor Executives' Association v. United States*, 151 F. Supp. 108 (D.D.C. 1957).¹⁷

Perhaps the cited pages, if read alone, would, in the words of this Court quoted hereinbefore, "create a suspicion of the existence of" a "pool of equipment." But

¹⁷ Indeed, in *Houff Transfer, Inc. v. United States*, 105 F. Supp. 851 D.W. Va. 1952), the absence of interchange of equipment was cited as a reason for disapproving a proposed merger.

to be "substantial" the evidence must do more than create such a suspicion. And, again recalling the quoted words of this Court, "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." If the District Court had considered the uncited evidence just referred to, as it should have done but evidently did not do, it could not even have found that the evidence created a suspicion of "a pool of equipment". It would have found merely that Nelson Co. maintained its vehicle inventory, not as a "pool", but for its own business, that Gilbertville Co. and Nelson Co. did business with each other, that part of such business involved interlining by interchanging, and that part of such business involved Gilbertville's supplementing its inadequate vehicle inventory in the only way its limited capital left open to it—leasing equipment which another carrier happened to have standing idle. Those facts constitute substantial evidence of neither "a pool of equipment" nor anything else sinister.

2. The District Court's quotation of the Commission's assertion "each operates to some extent, at least, under managerial direction from officers of the other" is followed by Commission counsel's bracketed citations "Tr., Shea, 847-53, 860-61; LaCour, 1015-16". (Messrs. Shea and LaCour were the ICC investigators to whom this case was assigned.) The testimony to be found in the cited pages is concerned with one day's visit by Messrs. Shea and LaCour to the Ellington, Connecticut terminal where both Nelson Co. and Gilbertville Co. had executive offices. Mr. Shea says that upon entering the terminal building they saw Kenneth "sitting at a desk [1] operating a teletype machine¹⁸ and [2] answering telephone calls and [3] also

¹⁸ Mr. Shea also says that Kenneth tore off, folded up and destroyed some used teletype tape which had grown "two or three yards" long, and was spilling out of the machine onto the floor. And later that day, no matter how often Mr. Shea demanded to see the tape, Kenneth failed to un-destroy it:

issuing orders over an intercom system to some one." (Pl. Ex. A Tr. 647-48; R. 2, 60) Later it appears that the "some one" was a Mr. Seiferth: "Mr. Kenneth Nelson issued some instructions over the intercom system down to the dock to Mr. Seiferth and instructed him to bring a certain vehicle up to the office. When Mr. Seiferth brought the vehicle up to the office, Mr. Kenneth Nelson then told him to take it back down again." (*id.* at Tr. 852) 19 [4] The

"A. [Mr. Shea] About thirty minutes later on the same day I asked Mr. Kenneth Nelson to produce the teletype tape that he had taken out of the machine for my inspection and he told me he had destroyed it.

"A. I showed Mr. Nelson a copy of the Commission's rules and again demanded that he produce the teletype records.

"Exam. Baumgartner: After he had told you he destroyed it.

"The Witness: I again made a demand on him to produce it.

"Exam. Baumgartner: What did he tell you upon your second demand?

"The Witness: He said, 'I have destroyed them.'" (Pl. Ex. A Tr. 850-51; R. 2, 60)

The cited testimony of Mr. LaCour simply corroborates the foregoing:

"A. Mr. Nelson could not or would not produce such records.

"Exam. Baumgartner: Now which is it, Mr. LaCour, you said would not or could not; there is a big difference.

"The Witness: He didn't produce the records in response to our request for them." (*id.* at Tr. 1013-16)

19 Mr. Shea at first appeared to know Mr. Seiferth's job:

"Q. [Mr. Mueller (JCC counsel)] Did you meet a Mr. Seiferth?

"A. [Mr. Shea] Yes, I did.

"Q. Did you ascertain what his job was there?

"A. He was a dock foreman.

"Q. A dock foreman in the employ of whom?

"A. L. Nelson & Sons." (Pl. Ex. A Tr. 852; R. 2, 60)

But on cross-examination, when appellants' counsel asked what Mr. Seiferth's job was, it appeared that Mr. Shea had been guessing:

"A. [Mr. Shea] He was a dock foreman or he had something to do with the loading dock out at the back of the building, out at the other building, out back.

"Q. [Miss Kelley (appellants' counsel)] What record did you see as to his job classification?

"A. I didn't see any records as to his job classification.

"Q. Did you learn what his duties were in and about the premises?

"A. Only by observing him, that is all." (*id.* at Tr. 953)

only other thing that Mr. Shea saw was Kenneth "issuing instructions, three times in our presence, to Mrs. Marjorie Edwards, whom we later found was in charge of the L. Nelson & Sons Co. office." (*id.* at Tr. 853)

At the outset, it might be doubted that these statements are substantial evidence of anything. That at one time one man can be operating a teletype machine, speaking over an intercom, and "answering [plural] telephone calls" is inherently incredible. Even putting such questions of credibility aside, Mr. Shea's story is supposed to show that "each operates to some extent, at least, under managerial direction from officers of the other". Yet answering telephone calls and operating a teletype machine are scarcely activities of "managerial direction,"²⁰ and Mr. Shea raises no doubt that any telephone answering or teletype operating Kenneth (who is an officer of Gilbertville Co.) may have done was done on behalf of Gilbertville Co.²¹ Also, the "orders" and "instructions" are obviously not facts, but are merely the conclusions of Investigator Shea, hardly an unbiased witness. Investigator Shea did not repeat the words he characterized as "instructions". Indeed, cross-examination revealed that the testimony was incompetent, for Mr. Shea did not even know what those words were:

²⁰ It may be, as Mr. Shea's testimony indirectly suggests (see note 18, *supra*), that failing to maintain a file of teletype tapes was a violation of Commission regulations, but that does not make it evidence of "managerial direction from officers of the other". The Examiner found that such violations of regulations as there may have been were "the result in some cases of ignorance of the requirements, and in others of a degree of carelessness and not wilfulness" (p. A-72, *infra*), and the Commission's Report made no reference to such violations.

²¹ Later on the same day Mr. Shea asked Clifford (who had been away when Messrs. Shea and LaCour arrived) to explain why Kenneth was "directing the operations of the L. Nelson & Sons Company's business." (Pl Ex. A Tr. 860; R. 2, 60) Naturally Clifford, in Mr. Shea's words, "could not explain" (*id.* at Tr. 861); Mr. Shea's question was as unanswerable as the legendary "Have you stopped beating your wife yet?"

Q. [Miss Kelley (appellants' counsel)]— Do you know whether or not that conversation involved inter-line shipments between Gilbertville and Nelson?

A. [Mr. Shea]— I do not know.

Q. Am I to understand that you do not know what the conversation was between Kenneth Nelson and Mrs. Edwards?

A. No, simply she would ask him a question; he would give her an answer." (*id.* at Tr. 954)

Of course, it would be perfectly natural and proper for Gilbertville Co. (represented by Kenneth) to talk to Nelson Co. (represented by Mrs. Edwards), or to ask Mr. Seifert to bring a truck around for Kenneth to see, in connection with interlined shipments, leases of equipment, or other matters of business between the two carriers.

All of the testimony in the passages cited by the District Court as supporting the assertion that "each [i.e., each of Nelson Co. and Gilbertville Co.] operates to some extent, at least, under managerial direction from officers of the other" has been summarized and or quoted hereinbefore. Half of that assertion (namely, that Gilbertville Co. operates under managerial direction from officers of Nelson Co.) is patently unsupported by the cited testimony, for nothing there even remotely suggests any connection whatever between Gilbertville Co. and any officer of Nelson Co. The other half is equally unsupported when the cited testimony is read together with the cross-examination of Mr. Shea quoted hereinbefore (this page 47 and note 14 *supra*). It cannot be doubted that (in the words of the *Universal Camera* case) the cross-examination "fairly detracts from . . . [the] weight" of Mr. Shea's story; indeed, the cross-examination shows that Mr. Shea testified to no more than his suspicions. Because the District Court failed to consider the cross-examination, it could not have determined

whether the Commission's findings and decision were supported by *substantial* evidence.

CONCLUSION

The appellants submit that the Commission's decision was based upon novel and erroneous rules of law, which not only have resulted in injustice to the appellants in the present case, but have a general importance to the future administration of the Interstate Commerce Act. Yet, because the District Court disregarded its role, the Commission's decision has not yet been subjected to any judicial review. We believe therefore that the questions presented by this appeal are both substantial and important.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 60-562-S

GILBERTVILLE TRUCKING CO., INC. ET AL.

THE UNITED STATES OF AMERICA,
DEFENDANT,

and

INTERSTATE COMMERCE COMMISSION,
INTERVENING DEFENDANT.

JUDGMENT

WOODBURY, CH. C. J., SWEENEY, CH. J., WYZANSKI, D. J.

After hearing and in accordance with the opinion of the Court, it is

ORDERED action dismissed with prejudice and with costs.

(s) PETER W. WOODBURY

Chief Circuit Judge

(s) GEORGE C. SWEENEY

Chief District Judge

(s) CHARLES E. WYZANSKI, JR.

District Judge

Judgment entered

July 18, 1961

Civil Action 60-562-S

GILBERTVILLE TRUCKING CO., INC.,
THE L. NELSON & SONS TRANSPORTATION
COMPANY, CHARLES G. CHILBERG,
CLIFFORD J. O. NELSON, GRETA C. CARLSON,
AND KENNETH A. H. NELSON,
PLAINTIFFS

THE UNITED STATES OF AMERICA,
DEFENDANT,
and
INTERSTATE COMMERCE COMMISSION,
INTERVENING DEFENDANT.

Before WOODBURY, *Chief Judge*, United States Court
of Appeals, SWEENEY, *Chief Judge*, United States
District Court, and WYZANSKI, United States
District Judge

OPINION

July 7, 1961

WYZANSKI, D.J.

Stated briefly, and subject to later amplification, this is a case brought by two motor carriers and four individuals who complain that the I.C.C. has invalidly ordered one of the individuals to divest himself of stock he holds in one of the two carrier companies, and also has invalidly denied the application of one of the two carrier companies to merge into the other carrier company.

The suit in this Court began with a complaint filed August 8, 1960 seeking to enjoin and set aside the following orders of the I.C.C.:

(1) the order of June 9, 1959 entered in No. MC-F-6099, (in the matter of The L. Nelson & Sons Transportation

Co.—Control and Merger—Gilbertville Trucking Co., Inc.), and No. MC-F-6178, (in the matter of The L. Nelson & Sons Transportation Co.—Investigation of Control—Gilbertville Trucking Co., Inc.), [the said order being set forth in the complaint as "Appendix B"].

(2) the order of February 15, 1960, entered in the same matters, [the said order being set forth in the complaint as "Appendix C"]; and

(3) the order of July 5, 1960, entered in the aforesaid No. MC-F-6099 and No. MC-F-6178, and also in No. MC-42871 (Sub-No. 3) (in the matter of The L. Nelson & Sons Transportation Company), [the said order being set forth in the complaint as "Appendix D"].

Hereafter these will be called orders 1, 2, and 3, respectively.

Jurisdiction to hear the complaint is conferred on this Court by chapters 85, 87, 155, and 157 of the Judicial Code, 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325.

Administratively, this case began when on October 6, 1955, pursuant to § 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), The L. Nelson & Sons Transportation Company, (hereafter called Nelson Co.), and Gilbertville Trucking Co., Inc. (hereafter called Gilbertville Co.) filed with the I.C.C. an application to merge the operating rights and properties of Nelson Co. as transferee and Gilbertville Co. as transferor. This is the matter to which the I.C.C. gave the number MC-F-6099. The governing Section, 5(2), provides as follows, as far as pertinent:

"(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties

theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; . . .

“(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 3054(c) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this

paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith with in the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

"(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

Other relevant sections meriting citation here are 5(4), 5(5) and 5(6), which read as follows:

"5, par. (4): Control effected by other than prescribed methods. It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers,

however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words "control or management" shall be construed to include the power to exercise control or management. Feb. 4, 1887, c. 104, Pt. I, §5, 24 Stat. 380; June 16, 1933, c. 91, Title II, §202, 48 Stat. 217; Sept. 18, 1940, c. 722, Title I, §7, 54, Stat. 905."

"§5, par. (5). Transactions deemed to effectuate control or management. For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons, affiliated with any one of them and persons affiliated with any such affiliated

carrier, taken together, in control of another carrier. Feb. 4, 1887, c. 104, Pt. I, § 5, 24 Stat. 380; June 16, 1933, c. 91, Title II, § 202, 48 Stat. 217; Sept. 18, 1940, c. 722, Title I, § 7, 54 Stat. 905."

"§ 5, par. (6). Affiliation with a carrier denied [sic]. For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier. Feb. 4, 1887, c. 104, Pt. I, § 5, 24 Stat. 380; June 16, 1933, c. 91, Title II, § 202, 48 Stat. 217; Sept. 18, 1940, c. 722, Title I, § 7, 54 Stat. 905."

December 20, 1955, pursuant to § 5(7) of the Act, 49 U.S.C. § 5(7), the I.C.C., reciting that it appeared that control or management of Gilbertville Co. in a common interest with Nelson Co. may have been effectuated and may be continuing in violation of § 5(4) of the Act, 49 U.S.C. § 5(4), ordered an investigation on the Commission's own motion. This is the matter to which the I.C.C. gave the number MC-F-6178. The relevant statutory section, § 5(7) reads as follows:

"Investigation by Commission of effectuation of control by nonprescribed methods. The Commission is authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4) of this section.

If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2)-(12) of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person. Feb. 4, 1887, c. 104, Pt. 1, §5, 24 Stat. 380; June 16, 1933, c. 91, Title II, §202, 48 Stat. 217; Aug. 9, 1935, c. 498, §1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, §7, 54 Stat. 905."

December 20, 1955, the I.C.C. assigned both matters for concurrent hearing on a joint record.

August 16, 1955 the I.C.C. referred these matters to Examiner Baumgartner for hearing on September 17, 1956. September 17 through September 26, 1956, Examiner Baumgartner held the hearing. He served his report June 8, 1957. July 8, 1957 the applicants filed exceptions to the report. The exceptions being disallowed, the I.C.C., by Division 4, on February 26, 1958 entered a report and an order reciting that "Gilbertville [Co.] or Nelson [Co.] have on various occasions violated the provisions of Section 206 and certain regulations promulgated under Part II of the Act", and that "Nelson [Co.] and Gilbertville [Co.] are controlled or managed in a common interest in violation of Section 5(4)", and ordering that Nelson Co. and Gilbertville Co. and four individuals, Chilberg, Clifford, J. O. Nelson, Greta C. Carlson, and Kenneth A. H. Nelson cease violations of §5(4) of the Act, and denying the companies' application to merge.

April 1, 1958 the applicants filed with the L.C.C. a petition for reconsideration of, and to set aside, the February 26, 1958 order of the Commission by Division 4.

October 2, 1958, Division 4 re-opened the proceedings.

June 9, 1959 the full Commission entered a report and order. The full Commission recited that it had recalled the proceedings from Division 4 for consideration and determination. Simultaneously the L.C.C. found that Kenneth Nelson had acquired control of Gilbertville Co. about March 2, 1953 in violation of (5(4) of the Act, and pursuant to the alleged authority of (5(7) of the Act, ordered him to divest himself of his stock interest in Gilbertville. This is Order 1 under review in this Court.

August 17, 1959 both companies filed with the L.C.C. a petition for reconsideration. February 15, 1960 the L.C.C. denied the petition and made effective the earlier order of June 9, 1959. This February 15, 1960 denial and order constitute Order 2 under review in this Court.

March 7, 1960 Nelson Co. petitioned the L.C.C. for cancellation of all its outstanding certificates of convenience and necessity, coincident with the vacation of the L.C.C. orders of June 9, 1959 and February 15, 1960. March 11, 1960 the L.C.C. temporarily stayed the effectiveness of its orders of ~~June 9, 1959~~ and February 15, 1960. Then July 5, 1960 the L.C.C. denied the petition of March 7, 1960, vacated the stay order of March 11, 1960, and reinstated its orders of June 9, 1959 and February 15, 1960. This cumulative disposition of July 5, 1960 is Order 3 under review in this Court.

Having portrayed the skeleton of the administrative proceedings before the L.C.C., and before examining in detail the factual record, we may notice the general nature of the principal questions which it presents.

(1) Is the order of June 9, 1959 invalid because it is not supported by findings which in form comply with the pro-

visions of the Administrative Procedure Act or with general principles governing L.C.C. procedure?

(2) Is the order of June 9, 1959 invalid because, even if the findings are proper in form, they are not supported by substantial evidence?

(3) Is the order of June 9, 1959 invalid because, even if the findings are proper in form and in substance, they lack the specific character adequate to support an order to Kenneth A. H. Nelson to divest himself of all his stock in Gilbertville Trucking Co.?

(4) Is the order of June 9, 1959 invalid because, even if the findings are proper in form and in substance, they do not warrant an order denying the merger application?

We now turn to a more detailed examination of the record before the L.C.C. In appraising this record we repeat that the only orders here under review are orders of the full commission and that the only questions now pertinent, as stated above, fall into two divisions: first, are the full commission's orders sustained by findings, made by it, adequate in form and in substance, and second, are those orders authorized by statutory provisions.

The best way to deal with the first set of questions is to set forth in full the essential portion of the text of the L.C.C. report of June 9, 1959, with the supporting transcript references conveniently supplied by defendants, in this Court. But before this is done, it will be helpful to set forth, as it were, a syllabus of their import.

The text, about to be quoted, shows a close business relationship between Kenneth A. H. Nelson, his mother, and her six other children. Originally they were all associated as shareholders in the Nelson Co. And the seven children are even now associated as equal owners of The Bergson Company. In 1952 Kenneth was still the owner of 92 of the 500 shares of the Nelson Co. He was in that year paid

\$15,650 as a "tariff consultant." The nature of this relationship and of this work is not precisely shown. Kenneth claims he held himself out not as an employee or officer but as an independent contractor; yet if he had clients other than Nelson Co. they were not shown. Moreover, in his work for Nelson his duties (properly inferable from his title, his rate of compensation, and miscellaneous specific minor incidents,) trench upon administrative or executive rather than strictly independent professional advisory functions.

Kenneth continued as tariff consultant during part of 1953. Samuel J. Solomon, a public accountant, who had rendered Nelson Co. continuous services almost since its organization (Tr. 28), and who as a principal witness before the I.C.C. was on the stand for several days, testified that Nelson Co. paid Kenneth \$13,800 in 1953, and that some of the services for which that payment was made were performed after Kenneth's acquisition of the stock of Gilbertville Co. (Tr. 427), that is, after March 2, 1953. That date is significant because, by a contract dated on that same March 2, 1953, Kenneth in cooperation with his half brother, Oscar Chilberg, and following consultation with Solomon, purchased all the shares of Gilbertville Co.

At a later date, Kenneth bought out Oscar. And the business of Gilbertville Co. continued and flourished under the direction and ownership of Kenneth.

At all times Nelson Co. and Gilbertville Co. shared the lease of a terminal at New York City. At four other terminals, owned by the previously mentioned family company, Bergson Co., Nelson Co. was a lessee, and Gilbertville Co. was a sublessee of Nelson Co. Telephones were shared at the terminal.

Equipment of one company is often leased to the other. Both draw upon the same group of drivers to some extent. There has been some commingling of traffic. Some items

of expense are shared upon a set formula, not shown to be other than arbitrary.

From these and other less significant subsidiary items, the L.C.C. purported to "affirm the findings in the prior report [of Division 4] and in the report of the examiner, that the control and management of Nelson [Co.] and Gilbertville [Co.] in a common interest has been effected and is continuing in violation of section 5(4) of the act."

This Court having supplied the foregoing "syllabus", the following quotation from the L.C.C. report of June 9, 1959, to which counsel have added in brackets the apposite transcript references, may now be set forth.

"The evidence shows that Mrs. Linnea Nelson, with two of her seven children, Charles and Oscar Chilberg, inaugurated the business of Nelson as a partnership in 1930 [Tr., Chilberg, 480]. It was incorporated in 1947 [Tr., Solomon, 193, and Ex. A to application]. As of May 14, 1948, of the 500 shares of authorized capital stock outstanding, 300 shares were held by Mrs. Nelson and 50 shares each by Charles and Oscar, and Clifford and Kenneth Nelson [Tr., Solomon, 30-31, 194]. Mrs. Nelson died in 1950 [Tr., Solomon, 30-31, 194-95] and her stock, less 6 shares which subsequently became treasury stock, was devised 42 shares each to her seven children [Tr., Solomon, 31-32, 194, 212]. In June and September, 1951, and in January 1953, Oscar and Kenneth sold their stock (92 shares each) to Charles and Clifford, respectively, and resigned from the business [Tr., Solomon, 29-30, 32-34, 39, 195-99, 209, 211]. Since the latter date Charles and Clifford have held 226 shares each of the capital stock of Nelson [Tr., Solomon, 202, 213, 215-16, 277-78]. Kenneth and Oscar have been neither officers nor directors since 1951 [Tr., Solomon, 35-36]. However, from September 1, 1951, to March 1, 1953, Kenneth had an

office at one of Nelson's terminals where as a "free lance" tariff consultant, he served only Nelson [Tr., Solomon, 180-82, 269-74, 422-27; Ex. Rept., sh. 44], and was paid by Nelson \$15,650 in 1952 [Tr., Solomon, 271-72] and \$13,829 in 1953 [Tr., Solomon, 277, 425-427].

Under a contract of March 2, 1953 [Tr., appl. Ex.], after consultation with his accountant and financial adviser [Tr., Solomon, 50-51, 83, 312-13], Kenneth agreed to purchase the capital stock of Gilbertville consisting of 100 shares, for a net consideration of \$22,447 [Tr., Solomon, 67-68, 358-60], of which \$10,000 was evidenced by a promissory note signed by him and Oscar [Tr., Solomon, 67-69, 324-36, 358-61, 371, 435]. A note of \$30,000 was secured from a bank on a note signed by the same individuals to help finance the transaction and to furnish Gilbertville with working capital [Tr., Solomon, 55-56, 322-23, 330-31, 370-72, 460-61]. Upon the transfer of that stock 51 shares were held by Kenneth, 48 by Oscar, and 1 share by Kenneth's attorney [Tr., Solomon, 78-79, 160, 335-36]. In March, 1954, Oscar transferred his shares to Kenneth [Tr., Solomon, 161-62, 332-35] who, in turn, transferred 24 shares each to his wife and to the manager of their terminal at Gilbertville, apparently in name only [Tr., Solomon, 80-83, 161-63, 332-40; K. Nelson, 689-99, 719-23].

The Bergson Company, organized January, 1953, is a real estate holding company [Tr., Solomon, 420], whose 490 shares of stock are owned in equal amounts by the seven children, and they are its directors [Tr., Solomon, 172-73, 421]. Kenneth is not an officer of Bergson [Tr., Solomon, 173]. Of the five terminals utilized by Nelson in its operations, four are leased from Bergson [Tr., Solomon, 172-77, 430-32], includ-

ing a terminal at Rockville-Ellington, Conn., which is also used as the headquarters of both Nelson and Gilbertville [Tr., Solomon, 148-49; K. Nelson, 399-700, 725]. The latter subleases terminal facilities from Nelson at Rockville-Ellington, Newton, Mass., and Woonsocket, R.I., owned by Bergson [Tr., Solomon, 172-77], and at New York City, owned by other parties [Tr., Solomon, 432, 447]. At a garage and repair shop maintained at Rockville-Ellington, Nelson performs about 25 percent of the repair work on the equipment of Gilbertville [Tr., Solomon, 165-66, 445-46; K. Nelson, 796-99, 824-27; Shea, 888-89, 1120-22].

At two of the terminals owned by Bergson, at the one in New York City, and at four other points, Nelson and Gilbertville have the same telephone numbers [Tr., Chilberg, 679-80; K. Nelson, 77-78, 786]. The total cost of leased interterminal telephone lines is \$1,100 a month and Gilbertville pays Nelson \$400 a month as sublessee [Tr., Chilberg, 679-81, 692; K. Nelson, 785-86, 805]. Nelson occasionally leases equipment from Gilbertville [Tr., Solomon, 168-70, 412-13; Chilberg, 484-85, 512-13], although the latter constantly and frequently leases from a pool of equipment maintained by Nelson [Tr., Solomon, 170; Chilberg, 524, 543-46; K. Nelson, 702-13, 819, Shea, 835-37, 844-46, 870; LaCour, 1023, 1029-31]. Both draw upon the same group of drivers [Tr., K. Nelson, 814-19; Shea, 853-54, 883; LaCour, 1005-09] and information relative thereto, including medical certificates, are maintained in the files of both companies [Tr., K. Nelson, 728-29, 814-16]. To the extent they interline [Tr., Chilberg, 495-99, 508; K. Nelson, 738-41], revenues are divided on a fixed percentage basis [Tr., Chilberg, 524-26, 691-92; K. Nelson, 707-09, 741-43; LaCour, 1016-20], and Nelson does all of the billing for such

traffic [Tr., Chubbong, 526-28; Shea, 854-59]. Frequently the same driver will be employed by both companies during the same pay period [Tr., K. Nelson, 814-20; Shea, 854, 883; LaCour, 1005-09], and on those occasions where a shipment moves from a point in the territory of one to a point in the territory of the other the same driver and vehicle will perform the through movement [Tr., K. Nelson, 782-83, 807-08; Shea, 1120-22]; under prearranged lease arrangements [Tr., K. Nelson, 762-69; 813-14; Shea, 845-47; 1120-22]. The two companies use the same source for accounting and financial advice [Tr., Solomon, 27-28, 83, 144, 189-91, 348, 440-41]; each operates to some extent, at least, under managerial direction from officers of the other [Tr., Shea, 847-53, 860-61; LaCour, 1015-16], and they are liberal with each other in settlement of intercompany accounts [Tr., LaCour, 1021-22, 1028-29]. There has also been a commingling of traffic of the two carriers in the same vehicles whenever it suits their convenience [Tr., Shea, 901-915, 916-22, Com. Ex. 29; 925-932, Com. Ex. 30; 932-36, Com. Ex. 31; 936-40, Com. Ex. 32; LaCour, 1040-50, Com. Ex. 34].

As of March, 1953, Gilbertville had one truck, three tractors, and four trailers [Tr., Solomon, 69-70, and Appl. Ex. 22], and had a deficit in surplus of \$33,868 [Tr., Solomon, 90]. As of December 31, 1953, however, it had a net worth of \$18,935 [Id.]. In 1953 Gilbertville's revenues were \$75,489 [Ex. B-6(3) to application], whereas for the first seven months of 1956 they had increased to \$444,777 [Appl. Ex. 8]. Its equipment increased substantially during that period [Tr., Solomon, 233-38, 245-48, 408, Appl. Ex. 23; K. Nelson, 702-95, Appl. Ex. 25]. In 1953 the revenues of Nelson were \$895,774 [Ex. A-7(3) to application] and for the first seven months of 1956 they were \$630,607 [Appl.

Ex. 4]. Under an authority granted by this Commission, Gilbertville, on June 16, 1954, acquired the operating rights of one Louis Marner, doing business as Wolff's Express [Tr., Solomon, 234-35, 389, Ex. B to application, Sh. 6]. In April or May of 1954, Charles Chilberg and Clifford Nelson negotiated for the capital stock of R. A. Byrnes, Incorporated [Tr., Solomon, 386-90], herein called Byrnes, and upon approval of this Commission [on May 15, 1956, Division 4 report, 75 M.C.C. 45, at 54; Appendix "F" to complaint, Sh. 16], the transaction was consummated August 21, 1956 [Tr., Solomon, 389-90, 394-95]. The general-commodity authority of Byrnes [Ex. A to application, Sh. 1] complements that of Gilbertville [Ex. B to Application, Shs. 4 and 5], and by interchange a through service on general commodities can be provided between points in Massachusetts, Rhode Island, and Connecticut, on the one hand, and, on the other, points south thereof to the District of Columbia. Considering all the facts of record, we are of the opinion, and find, that Kenneth Nelson was affiliated with Nelson within the meaning of section 5(6) at the time he purchased the stock of Gilbertville, and that the conclusive presumption of section 5(5) applies; we affirm the findings in the prior report, and in the report of the examiner, that the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing in violation of section 5(4) of the act."

Complainant's initial objection is that the language just quoted and other like passages do not constitute the sort of findings required by 5b of the Administrative Procedure Act, 5 U.S.C. 1007(b), or by established principles appropriately and traditionally governing findings of fact prepared by administrative agencies.

The answer is that it is no more requisite for agencies than for courts, acting under Rule 52 of Federal Rules of Civil Procedure, slavishly to set forth in wooden, numbered, footnoted paragraphs every step in the finding process. Cf. *Murray v. United States*, 361 U.S. 563, 1960, 1961. Some agencies, like some courts, prefer to put findings in narrative form, in the hope of redeeming judicial writing from the charge that it is arid, stilted, or, to borrow Chief Judge Cardozo's happy choice of an adjective, "agglutinative". If a fact-finder has the talent of Justice Holmes, his findings are not to be rejected because they are reminiscent of what (to adopt his three classical categories) Justice Holmes would have called a sting ray rather than a kitchen knife, or a razor blade. The purpose of findings of fact is to furnish the parties and the reviewing court with a sufficiently clear basis for understanding the premises used by the tribunal in preparing its conclusions of law, adjudications, and orders. This purpose the L.C.C. has fulfilled in the case at bar, as is demonstrated by the extended quotations set forth above. Indeed to prescribe for every fact-finder the mechanical process for which complainants plead would in all probability cause agency heads, judges, and others with like responsibility to depart further from the pungent, individualized standard of the best Anglo-American judicial writing and to delegate more than they now do to anonymous law clerks. In the name of formality, rigor, and precision, we may rob the law of that style and distinction, which both reflect personal consideration and show a mastery of the art of successful persuasion.

The L.C.C. findings are satisfactory not merely in form but in substance. The transcript references enclosed in the quotations prove that the statements of the L.C.C. are supported by evidence. Admittedly a modicum of the findings are trivial to the point of demonstrable irrelevance. But

if a reviewing court rejects a particular item as imponderable or inconsequential, that court need not remit the case for excision of that item and for a reweighing of the remaining mass. When a web of fact is woven to enclose one dominant issue of fact, (here the issue of common control) the pulling out of a few minor strings at points of less than crucial significance does not suggest that the net fails to hold. Nor does it require a new total appraisal.

Here complainants attack the I.C.C. for its inclusion in its report of some innocent conduct, or conduct of ambiguous nature. A reasonable reviewer would not conclude that the deletion of all reference to that conduct would alter or modify the I.C.C.'s ultimate and essential finding "that the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing in violation of section 5(4) of the act."

The next issue is whether as a matter of substantive law the subsidiary findings are adequate to show that sort of "control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly," which is proscribed by 5(4) of the Act. The comprehensive statutory outlawing indicates a fixed Congressional determination to pierce veils and search for the naked truth. We are to look for the presence of unified power, not to palter over dictionary distinctions, nor even to be our own lexicographer. Looking through the veil we see far, far more than one company owned by a brother of the dominant owner of another company, or one company managed by a former professional adviser of another company. Many phases of the two business have been allowed to converge and not just kept running in parallel series. We can see as the I.C.C. could see a design not of mere cooperation but of purposeful dovetailing for a common set of ends. Indeed the whole convergence begins with the purchase of shares in a second

company made by an individual at a moment when he is not shown to have severed a relationship with the other, a traffic nerve of the first company. And after the purchase, the operations of the two companies are so located, so served by employees, so closely identified by common avenues of public communication and approach that the ultimate finding made by the L.C.C. and the derived legal conclusion announced by the L.C.C. are not merely reasonable but inevitable to an unprejudiced, sophisticated mind. For this Court to reject this finding and this conclusion reached by a body informed of the transportation business and its practices, sensitive to the policy it administers under legislative delegation, would be not merely to usurp an administrative function but to displace a legislative prerogative.

The foregoing reasoning does not (despite complainant's contrary arguments,) require resort to any legislatively enacted definitions or presumptions. But it is meet to observe that the reasoning of the L.C.C. and of this Court is confirmed and at no juncture contradicted, by the statutory definitions and presumptions. No more is necessary than to quote once more the relevant sections of the Act. Section 5(5) provides:

"For the purposes of this section, but not in any wise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers:

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier; and if the effect of such transaction is to

place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier."

Section 5(6) provides:

"For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier."

And Section 1(3)(b) of the Act, 49 U.S.C. 1(3)(b), which is applicable broadly to motor carriers as well as other carriers, provides:

"For the purposes of sections 5, 12(1) 20, 304(a) (7), 310, 320, 904(b), 910 and 913 of this title, where reference is made to control (in referring to a relationship between any persons or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or

trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control. Feb. 4, 1887, c. 104, § 1, 24 Stat. 379; June 29, 1906, c. 3591, § 1, 34 Stat. 584; June 18, 1910, c. 309, § 7, 36 Stat. 544; Feb. 28, 1920, c. 91, § 400, 41 Stat. 474; June 19, 1934, c. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 2(a), (b), 54 Stat. 899."

A penultimate issue is whether, having found that § 4 of the Act was violated by Kenneth's acquisition of stock in Gilbertville Co., the I.C.C. was empowered to order him to divest himself of the stock. Congress did not specify this remedy. It left the matter at large to the discretion of the I.C.C. The delegated power was conferred by § 5(7) in these words:

"Investigation by Commission of effectuation of control by nonprescribed methods. The Commission is authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4) of this section. If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2)-(12) of this section, and penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person. Feb.

4, 1887, c. 104, Pt. 1, § 5, 24 Stat. 380; June 16, 1933, c. 91, Title II, § 202, 48 Stat. 217; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 7, 54 Stat. 905.

These are words of adequate amplitude to authorize a divestiture order. *U.S. v. E.I. duPont de Nemours and Company*, Sup. Ct. of U.S., Oct. Term 1960 No. 55, May 22, 1961; *F.T.C. v. Mandel Bros.*, 359 U.S. 385, 392-393; *American Power Co. v. S.E.C.*, 329 U.S. 90, 106, 112-113, 118; *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 193-194. Indeed, when the I.C.C. has found that an offender has unlawfully acquired control of a carrier and continues to hold the acquisition, an order of divestiture has aptness so perfect that the order not merely is obviously a suitable exercise of discretion, but needs no gloss.

The point just made also answers complainants' contention that the I.C.C. order of June 9, 1959 is defective because it is not buttressed by a preceding finding specifically setting forth the considerations which, after careful weighing, led the I.C.C. to command the disgorging. When the wrong consists in yielding to an appetite for unlawful acquisition, no tribunal is called on to write an essay on why it has given greater weight to the public demand that the wrongdoer immediately discharge himself, than the private demand of the wrongdoer that he be allowed, absolutely or conditionally, to keep what he has swallowed. As the cases cited above show, the law is full of examples of similar complete remedies instantaneously imposed on prohibited acquisitions, no matter how much time has elapsed since the forbidden event, no matter how embarrassing the requirement of prompt action in an unfavorable market. See *U.S. v. duPont*, above.

The final issue is whether the I.C.C., having found, upon investigation, that Kenneth had violated § 5(7) of the Act by acquiring and continuing control of Gilbertville Co., the

L.C.C. acted without statutory authority in using that finding as a basis for denying the application of Gilbertville Co.^B and Nelson Co. that, by merger, the former transfer its assets to the latter. Here the L.C.C. did no more than to refuse lawful unification to companies which it had found had precipitately and perilously effectuated a prohibited union without permission. Under some imaginable circumstances, to have granted the merger application might conceivably be in the public interest. But to deny application to formalize and strengthen a relationship already in part achieved by unlawful conduct is a clearly proper exercise of a delegated discretionary authority.

Inasmuch as the objections raised to the L.C.C. order of June 9, 1959 are all without merit, it follows that there can be no valid objection to the L.C.C. order of February 13, 1960 which merely reinstated it, nor to the L.C.C. order of July 5, 1960 which merely refused to allow Nelson Co. to escape the effect of the June 9, 1959 order by cancelling all its outstanding certificates of convenience and necessity.

Complaint dismissed with prejudice and costs.

[Report of the Commission on Reconsideration by the Commission in *The L. Nelson & Sons Transportation Co., Control and Merger—Gilbertville Trucking Co., Inc.* is published at 80 M.C.C. 257.]

[Report of the Commission by Division 4 in *The L. Nelson & Sons Transportation Co., Control and Merger—Gilbertville Trucking Co., Inc.* is published at 75 M.C.C. 45.]

INTERSTATE COMMERCE COMMISSION

No. MC-F-6099¹

THE L. NELSON & SONS TRANSPORTATION CO.,
CONTROL AND MERGER
GILBERTVILLE TRUCKING CO., INC.

Decided

1. In No. MC-F-6099, acquisition by The L. Nelson & Sons Transportation Co., of control of Gilbertville Trucking Co., Inc., through acquisition of its capital stock, and merger of its operating rights and property into the former for ownership, management, and operation; and acquisition by Charles G. Chilberg and Clifford J. O. Nelson of control of the operating rights and property through the control and merger, approved and authorized, subject to conditions.
2. In No. MC-F-6178, upon investigation, respondents found to have effectuated or participated in effectuating, and to be continuing, control and management of Gilbertville Trucking Co., Inc., and The L. Nelson & Sons Transportation Co. in a common interest in violation of section 5(4) of the Interstate Commerce Act. Investigation discontinued subject to condition.

Mary E. Kellen for applicants in No. MC-F-6099 and respondents in No. MC-F-6178.

Francis E. Barrett, Francis E. Barrett, Jr., Hugh M. Josloff and *Arthur J. Piken* for protestants in No. MC-F-6099 and interested parties in No. MC-F-6178.

Robert G. Bleakney, Jr., William O. Keenan, James G.

¹This report embraces also No. MC-F-6178, The L. Nelson & Sons Transportation Co.—Investigation of Control Gilbertville Trucking Co., Inc.

Laure, T. W. Marrett, and Kenneth B. Williams for interested parties in Nos. MC F-6099 and MC F-6178.

Ellis F. Gregory, Neil G. Gain and Herman F. Mueller for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

REPORT PROPOSED BY WALTER L. BAUMGARTNER, *Examiner*

The L. Nelson & Sons Transportation Co., a corporation of Ellington, Conn., and Gilbertville Trucking Co., Inc., of Gilbertville, Mass., herein called Nelson and Gilbertville, respectively, by joint application filed October 9, 1955, in No. MC-F-6099 seek authority under section 5 of the Interstate Commerce Act, for (1) acquisition by the former of control of the latter through acquisition of its shares of stock by exchange, and (2) for the merger of the operating rights and property of the latter into the former for ownership, management, and operation. Charles G. Chilberg of Rockville, Conn., and Clifford J. O. Nelson of Dover, Mass., who are officers of, and control, Nelson through ownership in equal amounts of 91.50 percent of its capital stock, also seek authority under the same section to acquire concurrent control of the operating rights and property through the transaction.

By order entered December 20, 1955, in No. MC-F-6178, an investigation was instituted under section 5(7) of the Act, for the purpose of inquiring into and concerning the possibility that the control or management of Gilbertville in a common interest with Nelson may have been effectuated, and may be continuing, in violation of section 5(4) of the Act, and if such violations are found, of entering an order requiring the participants therein to take such action as may be necessary to prevent further such violations. Nelson, Gilbertville, Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson and Kenneth A. H. Nelson were named as respondents in the proceeding, herein sometimes

referred to as the investigation or investigation proceeding. By the same order, the investigation proceeding and the application were assigned for concurrent hearing and determination on a joint record. Since they are interrelated, they will be the subject of a single report.

At the hearing thirteen motor common carriers of property² and the eastern territory railroads appeared and participated in opposition to the application and as interested parties in support of the investigation. The applicants-respondents, each of the motor carriers and the Commission's Bureau of Inquiry and Compliance introduced evidence. The railroads limited their participation in the hearing to the cross-examination of applicants' and respondents' witnesses.

The carrier applicants-respondents operate more than twenty motor vehicles.

They press on brief objections made at the hearing to various rulings of the examiner. Objection was made to his ruling on the order of presentation whereby applicants were required to go forward with the evidence in support of the application prior to the presentation of evidence in the investigation proceeding. It is their position that, since Nelson's fitness to acquire and exercise the Gilbertville operating rights is involved in both proceedings, they were entitled to hear the evidence against them in the investigation proceeding first so that they might be apprised of the evidence against them before having to meet

² Adley Express Co., Alvin R. Holmes d' b a Holmes Transportation Service and or Jones Express, Downing & Perkins, H. T. Smith Express Co., Hemingway Bros. Trucking Co., Jackson Transportation Corp., Lombard Bros., Inc., M & M Transportation Company, National Transportation Co., Newbergh Transfer, Inc., P. B. Mutrie Motor Transportation, Inc., Taylor's Express Co., and Westchester Motor Lines, Inc., herein called Adley, Holmes, Downing, Smith, Hemingway, Jackson, Lombard, M & M, National, Newbergh, Mutrie, Taylor and Westchester, respectively.

it in the application proceeding. They also claim that, as a result of the ruling, erroneous rulings were made upon improper efforts during the cross examination of applicants' witnesses to elicit testimony helpful to the investigation. The examiner's ruling with respect to the order of presentation was in harmony with rule 1.74 of the Commission's General Rules of Practice prior to, and as amended, January 8, 1937, effective March 15, 1937, reading in pertinent part as follows:

"In informal complaint, application, and investigation proceedings, complainant, applicant, and respondent, respectively, shall open and close at the hearing. . . . The foregoing order of presentation may be varied by the (hearing) officer, who shall also designate the order of presentation in any other type of proceeding, of any other party to any proceeding, or of parties to several proceedings being heard upon a consolidated record."

The examiner's rulings upon objections made to questions and upon the admissibility of evidence during such cross-examination have been carefully examined and found proper. In any event, if erroneous in any respect, the rulings to that extent were harmless error. Since the investigation is not a criminal proceeding but civil in nature and conducted to enable the Commission to issue such corrective orders as may be necessary and appropriate to secure compliance with the Interstate Commerce Act, and since the investigation involved matters bearing upon the fitness of the applicant Nelson, an issue upon which applicants have the burden of proof and upon which opposing carriers have the right to submit evidence in rebuttal, in the application proceeding, and since applicants-respondents have failed to establish that they were in any way prejudiced by the ruling on the order of presentation, there is no basis for a finding

that the examiner abused his discretion therein and the Commission should overrule the objections thereto.

Applicants respondents also assert error in various rulings upon their objections to questions propounded by the Bureau of Inquiry and Compliance to two witnesses produced by it upon the ground that the questions called for hearsay statements. The two witnesses were employees of the Commission who, during the course of an investigation of the operations of Gilbertville and Nelson, were given certain information with respect thereto in response to oral inquiries by a Gilbertville director and terminal manager and by Kenneth Nelson, president of Gilbertville, and by Clifford Nelson and Charles Chilberg, secretary and president, respectively, of Nelson. All of these gentlemen were actively engaged in the performance of managerial functions of one or both of the carriers. Over objection, one of the witnesses was permitted to testify to statements made to him by the terminal manager as to his connections with Gilbertville his previous employment by Nelson, his receipt from Kenneth of 24 shares of Gilbertville stock, the practices followed by the two carriers in effecting through movements of shipments under equipment leases between them and the repair of Gilbertville equipment in Nelson's shop at Ellington. The facts respecting the declarant's relationship and connection with the two carriers were already of record through other evidence. The equipment leasing and repair practices were matters within the scope of his employment concerning which, as an agent, he could speak with authority and binding effect upon his employer, a party to both proceedings here. His statements were admissions against interest or voluntary acknowledgements made by Gilbertville through its agent within the scope of his employment. 31 C. J. S., paragraphs 270, 271, and 272, pp. 1022-1024; *Ram American Petroleum & T. Co. v. U. S.*, (1927), 273 U.S. 456, 499; *Takahashi v. Hecht Co.*,

(1931), 50 F.2d 326, 328. "The repetition on the witness stand of information elicited by the witnesses from Kenneth and Clifford Nelson and Charles Chilberg was clearly admissible hearsay since it disclosed admissions against interest by parties to the proceedings who were also officers and agents of the corporate parties. 31 C. J. S., paragraph 354, p. 1128; *Pan. American Petroleum & T. Co. v. U. S.*, *supra*.

Error is also claimed in the examiner's rulings preventing testimony of the same two witnesses as to the provisions of Commission regulations and the law applicable to acts of the respondents alleged to be unlawful. The testimony of a witness as to what the domestic as distinguished from foreign law is wholly incompetent. The courts, and, hence, the Commission must take judicial and official notice of Federal statutes and agency regulations. The sources are open to the courts and the Commission and it is their duty to hear the evidence and determine for themselves the law applicable thereto. *U. S. v. Hobbs*, 41, (1932), 2 F. Supp. 832, 836; *W. U. Tel. Co. v. White*, (Tex. 1914) 162 S. W. 905, 909; *Owens v. National Hatchet Co.*, (Iowa 1909), 121 N. W. 1076, 1079; 44 U. S. C. 307; Rule 4.75, General Rules of Practice.

On November 12, 1954, one of the witnesses referred to above, while visiting Gilbertville's terminal at Newton, Mass., in the pursuance of his duties, discovered and made a copy of a teletype message made and received at the terminal. It was received in evidence as an exhibit after an explanation of its source and of its contents by the witness. It related to the handling of Gilbertville freight and the use of its vehicle. Objection was made both to its reception in evidence and to the witness's explanation of its contents on the ground that its contents were not clear, etc. A portion of its text will be set out later in this report. Suffice it to say at this point that an analysis of it makes

its meaning clear and establishes its relevancy. The objection made goes to its weight rather than its admissibility or competence.

Error by the examiner is also claimed by a ruling excluding the testimony of an accountant, called as a witness by applicants, with respect to Gilbertville's operating revenues for periods prior to Kenneth Nelson's purchase of it. Objection was sustained on the ground that the accountant not having compiled the figures and not having checked them against the underlying data from which they were taken was not qualified to testify as to their accuracy and significance particularly on cross-examination. On brief, applicants-respondents rely upon rule 1.79 of the General Rules of Practice which embodies in part the "shop-book" rule of evidence relating to the admissibility of any writing or record made as a memorandum or record of any transaction if made in regular course of business at the time of the transaction or shortly thereafter, etc. As no proper foundation had been laid to render the testimony admissible, the ruling was clearly correct, and if not, it was harmless error, since the relevance or materiality of the testimony sought is not apparent and was not shown.

Two motions were filed by applicants-respondents requesting that parts of two briefs filed by motor carriers opposing the merger be stricken. The Commission is requested to strike two parts of the brief filed in behalf of Mutrie, Holmes, Newburgh and Taylor, each of which is asserted to contain "libelous" statements with reference to applicants-respondents wholly lacking in evidentiary support. In answer, counsel for Mutrie et al. request that the Commission strike from the brief any comment which it feels is in the slightest degree improper or in contravention of any rule of the Commission. Rule 1.4(d) of the General Rules of Practice provides that the Commission may order any redundant, immaterial, impertinent or scandalous

matter stricken from any pleading, document or paper filed with it. The portions of the brief under criticism contain arguments made in good faith and evolved in the author's consideration of matters in evidence. Not all may agree that his reasoning or deductions are sound, but they appear to be permissible and plausible. The slight amount of intemperate language may be ascribed to overzealousness in argument which usually does not generate conviction and sometimes defeats its own purpose. The motion to strike should be denied.

The second motion is directed to the brief filed in behalf of Adley, M & M, and Henningway and requests the striking of three portions thereof. The first two are challenged as efforts to import into the record or to draw attention to matters not of record. Since such matters have in no way been shown to be relevant or material to the issues here, they will be disregarded even though not stricken. The third portion sought to be stricken appears to be legitimate argument based upon facts in evidence. Much of the considerations urged in support of the motion appears to be in the nature of a reply to the brief and may not be weighed since reply briefs were not contemplated here. The motion should be denied.

BACKGROUND AND CORPORATE ORGANIZATIONS

Mrs. Linnea Nelson, married twice, was the mother of seven children, viz., Charles C., Oscar H., and Howard Chilberg, Kenneth A. H., and Clifford J. O. Nelson, Greta C. Nelson Carlson and Ruth Nelson Widham Nyberg. Mrs. Nelson, in partnership with two of her sons, Charles and Oscar Chilberg, inaugurated the Nelson transportation business in 1930. The L. Nelson & Sons Transportation Co. was incorporated under the laws of Connecticut on February 7, 1948. Of the 500 shares authorized, all common, 496 were issued to her and one share each to four of her

sons, viz., Charles and Oscar Chilberg and Clifford and Kenneth Nelson. On May 14, 1948, she transferred 49 of her shares to each of those sons, thus increasing their holdings to 50 shares each, and reducing hers to 300 shares. In January 1949, she was president and treasurer, Oscar vice-president, Kenneth assistant treasurer, and Clifford secretary. On January 5, 1950, Mrs. Nelson died, testate, devising 42 shares of her stock to each of her seven children (total 294). The other six shares were purchased from the estate by Nelson and held as treasury stock. During the administration of her estate, her 300 shares were voted under proxy by Charles, who was one of the three executors.

On June 30, 1951, Oscar sold his 50 shares to Charles and resigned as an officer and director of the corporation. On September 22, 1951, Kenneth sold his 50 shares to Clifford and likewise resigned as an officer and director. Neither has since been an officer or director of the company. Howard, who was employed as office manager, severed his employment in 1951.

Stock distribution from Mrs. Nelson's estate was made on January 24, 1953, at which time Kenneth transferred his 42 shares to Clifford in accordance with his agreement to sell made September 22, 1951. Oscar sold his 42 shares to Charles. Shortly thereafter Howard Chilberg and Ruth Nelson Nyberg sold their respective shares in equal amounts to Charles and Clifford. Hence, ever since then, Charles and Clifford have each held 226 shares and Greta Nelson Carlson 42 shares. Charles is now president, treasurer and a director, Clifford secretary, assistant treasurer and a director and Greta Carlson a director.

R. A. Byrnes, Incorporated, formerly of Mullica Hill, N.J., is a motor common and contract carrier controlled through stock ownership by Charles Chilberg and Clifford Nelson pursuant to authority granted by the Commission on August 21, 1956, in M&F 5749. Its books and records are

kept at, and its operations are directed from, the Ellington-Rockville, Conn., terminal where Nelson and Gilbertville are headquartered.

Gilbertville is a Massachusetts corporation organized June 26, 1940, with an authorized capital of 100 shares of no par common stock. For corporate purposes, its principal place of business is registered as Gilbertville, Mass. In January, 1953, all of the stock was owned by Wilfred Vachon. At that time, Kenneth began negotiations for, and sought the advice of his accountant and financial adviser with respect to, their purchase. By a contract, dated March 2, 1953, Kenneth agreed to buy the stock for \$35,000, out of which were paid in accordance with the contract, all liabilities of the corporation in excess of its good operating assets. Vachon realized a net of \$22,447, of which \$12,447 was paid him in cash and \$10,000 by a promissory note signed by Kenneth Nelson and Oscar Chiberg. The note was payable at the rate of \$500 per quarter, interest at 4%, and secured by an escrow of the stock purchased. To assist in financing the transaction, \$30,000 was borrowed from a bank upon a promissory note signed by Kenneth and Oscar. Of the amount so borrowed, \$5,000 was advanced to Gilbertville by Kenneth for working capital. The \$10,000 note to Vachon was paid off within a year by checks drawn on Gilbertville, signed by Kenneth. The \$30,000 borrowed from the bank had not been repaid as of the time of the hearing. The 100 shares were transferred to Kenneth who in turn transferred one qualifying share to his attorney and 48 to Oscar. Kenneth became president, Oscar treasurer, and the attorney, clerk. All became directors. In March of 1954, Oscar caused transfer of his 48 shares to Kenneth who then transferred 24 to his wife and 24 to John Kashady, Gilbertville's terminal manager at Gilbertville, to enhance his prestige. Oscar resigned as treasurer and director. Kenneth became treasurer in addition to his presidency and the four stock-

holders became directors. Neither Kenneth's wife nor Oscar nor Kashady paid anything for the stock transferred to them. Oscar was not a party to the purchase contract, never took an active part in the affairs of the corporation, invested no money therein and received no salary or other compensation from it. Kenneth testified, in effect, that he is the beneficial owner of the stock and can deliver it to Nelson if the merger is approved.

The Bergson Company, herein called Bergson, an outgrowth of the estate of Linnea Nelson, is a real estate holding company organized in January, 1953. Each of her children holds 70 of the 490 outstanding shares of the company. Oscar is president, Charles is vice-president and treasurer, and Clifford is secretary. All of the children serve as directors and receive \$360 per year each as salary. No dividends are paid. Certain of its properties, approximately two-thirds in value and 10 percent in area, are leased to Nelson and used by it and, under sublease, by Gilbertville as will be more particularly noted later.

OPERATING AUTHORITIES INVOLVED IN MERGER

On April 27, 1955, in No. MC-42871, Sub. 3, a certificate was issued to Nelson authorizing operation in interstate or foreign commerce as a motor common carrier of (a) materials used in the manufacture of cloth, waste materials resulting therefrom, and supplies and materials used in connection with transportation or processing of such commodities, when moving to or from places of processing, except liquid commodities, in bulk, in tank vehicles, over irregular routes, (1) between Hudson, North Chelmsford, Norton, Lowell, Lawrence and Marlboro, Mass., on one hand, and, on the other, Manchester, Concord, and Somersworth, N.H., and points in Providence and Bristol Counties, R. I.; (2) between Providence, Woonsocket and Pawtucket, R.I.

Hartford, Hazardville and Somersville, Conn., and points in Massachusetts east of the Connecticut River, on the one hand, and on the other, New York, N.Y., Jersey City, Passaic, Newark and Camden, N.J., Philadelphia, Pa., and points in Pennsylvania within 30 miles of Philadelphia: (3) between Hazardville, on the one hand, and, on the other, Milbury and East Douglas, Mass.; (4) from Philadelphia and Camden to points in Tolland and Hartford Counties, Conn., on and north of U.S. Highway 6; and (5) empty containers used in transporting the commodities named above, over irregular routes from the said points in Tolland and Hartford Counties to Philadelphia and Camden. Nelson also holds intrastate general commodity irregular route authority in Connecticut and Massachusetts.

On April 1, 1941, in No. MC 90186, a certificate was issued to Byrnes authorizing operation in interstate or foreign commerce as a motor common carrier over irregular routes: (a) of general commodities, except explosives, poles, canned foods and commodities used in canning or processing food, (1) between New York City, on the one hand, and, on the other, Philadelphia and points in Pennsylvania within 25 miles thereof and those in New Jersey; (2) from points in New Jersey to Philadelphia and points within 25 miles thereof; (3) from New York City and points in New Jersey to those in portions of Delaware, Maryland, and Virginia and all of the District of Columbia; (4) of fertilizer from Baltimore, Md., and Philadelphia to points in New Jersey; (5) of oil in containers from Claymont, Del., to Camden; (6) of produce, except that used in processing food, from Gloucester, Salem and Cumberland Counties, N.J., to the District of Columbia and to certain portions of Pennsylvania and New York. On April 25, 1941, in No. MC 93421, a permit was issued to Byrnes authorizing operation in interstate or foreign commerce as a contract carrier over irregular routes, (a) of commodities used in canning

or processing food from New York City, Philadelphia and Baltimore to Swedesboro, N.J.; and (b) of canned goods from Swedesboro to Massachusetts, Rhode Island, Connecticut, Delaware, Maryland and the District of Columbia, Virginia within 25 miles of the District, and portions of Pennsylvania and New York. Upon Byrnes' application in No. MC-93421 Sub-1, the Commission by a report, dated August 16, 1956, ordered, among other things, the enlargement of the operating authority above-described to include "canned goods from Philadelphia to Swedesboro" and found that the holding by Byrnes of a permit containing the operating authority as so enlarged concurrently with the holding by Nelson of the certificate in No. MC-42871 will be consistent with the public interest. *R. A. Byrnes, Inc.—E.A.—Canned Goods*, 68 M.C.C. 57.

On February 25, 1955, in No. MC-87431, a consolidated certificate was issued to Gilbertville authorizing operation in interstate or foreign commerce as a common carrier of (a) general commodities, with the usual exceptions, over 17 described regular routes between Lowell, Mass., and Boston, Mass., serving 31 intermediate, and 5 off-route, points in Massachusetts, (b) the same commodities over irregular routes between points in Massachusetts, (c) the same commodities over irregular routes (1) between the Town of Hardwick, Mass., on the one hand, and, on the other, New York City and points in New York and New Jersey within 20 miles of New York City, (2) between Palmer, Mass., and points in Massachusetts within 10 miles of Palmer, on the one hand, and, on the other, points in Connecticut and Rhode Island, (3) between Palmer and Monson, Mass., on the one hand, and, on the other, points in Massachusetts within 5 miles of Palmer and Monson, (d) of sanitary napkins, facial tissues, and paper boxes over regular routes between New York City and Wilmington, Del., serving Philadelphia and the off-route point of Rockland, Del., and (e)

of sanitary napkins, facial tissues, and machinery, over its regular routes, from Hardwick, Mass., to Boston, New York City and points in New York and New Jersey within 20 miles of New York City, (f) materials used or useful in the manufacture and sale of sanitary napkins and facial tissues, in the reverse direction, (g) pickled skins from New York City to Ipswich and Peabody, Mass., (h) pulpboard from Boston to Hardwick, (i) fertilizer and fertilizer materials from Portland, Conn., to Hardwick and points in Massachusetts within 15 miles of Hardwick, (j) lime and limestone products from Adams and Lee, Mass., to Hardden, East Hartford, and Hartford, Conn., Providence and Woonsocket, R.I., New York City and points in New Jersey within 10 miles of New York City, (k) agricultural commodities from Hardwick to Melrose, Conn., and New York City, (l) household goods between Palmer and points in Massachusetts within 10 miles of Palmer, on the one hand, and, on the other, points in Vermont, and between Hardwick and points in Connecticut, New Jersey, New York and Rhode Island; and (m) livestock between Palmer and points in Massachusetts within ten miles thereof, on the one hand, and, on the other, points in Vermont. The operating authority described in (a) and (b) above was transferred to Gilbertville for \$7,500 cash pursuant to a purchase agreement by Lewis R. Marner on August 12, 1954, under approval given in No. MC-FC-57090.

THE MERGER AGREEMENT

Under the terms of the agreement dated August 18, 1955, between Kenneth Nelson and Gilbertville on the one hand and Nelson on the other, reciting a mutual desire to merge the respective motor transportation businesses of the two carriers, Kenneth would within 60 days after the effective date of the final order of the Commission approving the transaction, transfer to Nelson all of the shares of Gilbert

ville stock in full consideration for which Nelson would transfer to Kenneth as many shares of Nelson stock as may be due him based on the then net book value of the respective corporations after provision for Federal and State corporation taxes as of the date of the transfer. It was recognized and acknowledged in the agreement that upon that basis, if consummation had been effected on May 31, 1955, the relationship of the net book values were such that Kenneth would have received 85 shares of Nelson stock for his 100 shares of Gilbertville stock. An exhibit in evidence shows that if consummation had taken place on July 31, 1956, Kenneth would have received only 78 shares of Nelson stock. It was further agreed that as soon after approval of the transaction by the Commission as practical Nelson would seek authorization from the proper authorities to increase its capital stock by an amount necessary to carry out the agreement. Each corporation agreed to an audit of its books by the other to enable computation of the respective book values of their shares. It was further agreed that any party to the agreement whose rights would be diminished or obligations increased by compliance with any condition or limitation which the Commission might attach to its approval of the transaction may terminate the agreement upon proper written notice to the other party within 10 days after receipt of the final order of the Commission. Gilbertville agreed to cooperate in the preparation and filing of the "application for merger of the properties of Gilbertville and Nelson." While the agreement contains no provision for the assumption by Nelson of Gilbertville's liabilities, it was represented at the hearing and is the understanding of the parties that it is to do so.

FACILITIES AND OPERATIONS

As of July 31, 1956, Nelson owned and operated 14 trucks, 61 tractors, and 83 trailers. On the rare occasions

when it may be necessary to augment its fleet, it leases equipment from Gilbertville. Nelson has 110 employees: 10 office employees, 5 terminal managers, 5 dispatchers, 6 mechanics, 3 utility men, 2 salesmen and 79 drivers. It maintains five terminals: one each at Rockville-Ellington, Conn., Newton, Mass., Woonsocket, R.I., Long Island City (which is within New York City), and Philadelphia. All of the terminals, except that at Long Island City, are leased from Bergson at a total monthly rental of \$675 or \$8,100 per year. Occupancy of the Long Island terminal is shared, without assignment of specific space, with Smith & Jordan, a motor carrier from which Nelson rents space, Gilbertville and Byrnes. The premises at Rockville-Ellington consists of a yard, a two-story building the first floor of which is occupied by Nelson and Byrnes as headquarters and the second floor of which is occupied by Gilbertville for similar purposes, and another building in the rear used as a terminal. Nelson maintains a garage and repair shop on the premises where five mechanics are employed. It employs a dispatcher at each terminal, with instructions to dispatch only its equipment and drivers. It leases, and shares with Gilbertville and Byrnes the use of, telephone lines connecting all of the terminals and Bridgeport, N.J.

Under temporary authority from the Commission Charles Chilberg and Clifford Nelson assumed control of Byrnes on August 12, 1954, and have been operating it since then.

Nelson renders overnight service between its New England points and those in the areas in New York, New Jersey and Pennsylvania it is authorized to serve. Over 75 percent of its total traffic is interstate and 70 to 75 percent is truckload. About 8 percent in dollar volume is interlined with Gilbertville and 15 to 20 other carriers, of which approximately 6 operate in the same area as Gilbertville. Only 2 to 3 percent is interlined with Gilbertville.

The operations of the latter are chiefly irregular route in the performance of call-on-demand overnight service. Its interstate traffic preponderates. It endeavors to observe its Hardwick and Palmer gateways in accordance with its operating authority. About 70 to 75 percent of its operating revenues are derived from business local to its lines and about 25 to 30 percent from interline traffic. Interline is made with approximately 50 motor carriers, including Nelson and Byrnes. Divisions of revenues with carriers with which interchanges are frequent is upon a fixed percentage basis regardless of the length of the hauls as between the respective carriers. Thus the division with Nelson is 60 percent to Nelson and 40 percent to Gilbertville. With respect to some other carriers, the division is upon a mileage-prorate basis.

When Kenneth took over in March 1953, Gilbertville had one truck, three tractors and four trailers. As of July 31, 1956, it had 15 trucks, 12 tractors and 8 trailers with a depreciated ledger value of \$106,828. Except as to four used tractors purchased from Nelson in October, 1954, for \$200 each (depreciated on Nelson's books to \$100 each) all additions to equipment were new units. Gilbertville augments its fleet almost daily by leasing equipment in varying amounts from Nelson. It has a terminal at Gilbertville, Mass., and, in conjunction with Nelson, one each at Rockville-Ellington, Newton, Woonsocket and New York City, at each of which it provides collection-and-delivery service on less-than-truckload shipments. About three units per day are used in over-the-road operation between New York City and Massachusetts points. At each terminal, except Rockville-Ellington, it employs a terminal manager, and at Rockville-Ellington and New York City, dispatchers. In all, it employs 71 persons: 53 drivers, 4 terminal managers, 3 dispatchers and 10 office employees. Its principal book-keeping and transportation records are kept at the Rockville-Ellington headquarters.

INTERRELATIONS OF THE APPLICANTS

Although Kenneth Nelson disposed of his stock in, and resigned as an officer of Nelson in September, 1951, he continued to have an office on Nelson's premises at Rockville-Ellington. As a "free lance" tariff consultant, he rendered bills to, and was paid periodically by, Nelson in the total amounts of \$15,650 in 1952, and \$13,829 in 1953. From March 1 of 1953, he was in control of and operated Gilbertville. For that year, its administrative and general expense amounted only to \$4,389. For 1954, such expense jumped to \$31,927 and, for 1955, to \$49,124. On their visit to Nelson's office at Rockville-Ellington in November, 1954, two employees of the Commission engaged in investigation observed Kenneth engaged in activities believed to be in furtherance of Nelson's business. Among other things, they noticed him at a desk answering telephone calls, issuing orders over an intercommunication system, and operating a teletype machine. At that time Nelson's terminals were equipped with intercommunicating teletype machines. Kenneth tore two to three yards of the teletype tape covered with messages of the machine and folded it. About 20 to 30 minutes later, one of the Commission's men requested production of the tape for inspection and was told by Kenneth that he had destroyed it. Another such request made after exhibiting to him a copy of Commission regulations requiring preservation of carrier teletype messages for three years, elicited the same response. Upon inquiry addressed that day to Clifford Nelson, he offered no explanation of Kenneth's activities in the Nelson office. Some time during the ensuing year, interterminal telephone lines had been substituted for the teletype service because, Kenneth explained, the latter was found to be very slow and required the use of a skilled operator.

John Kashady, Gilbertville's director and terminal man-

ager at Gilbertville, Mass., had been employed by Nelson for 15 years prior to his connection with Gilbertville.

On November 12, 1954, one of the Commission's employees found at the Newton terminal occupied jointly with Nelson, a record of teletype messages transmitted apparently by Clifford Nelson from Rockville-Ellington giving instructions to some one at the Newton terminal. In substance, they and the answers were as follows:

Oh don't tell me a truck is going to come home empty. Over. Not at all, will have enough freight and could have more. Over. OK, make sure that any Gilbertville freight is in sealed envelopes and driver doesn't know he has it. That goes for Woonsocket. I will tell him also. How about Friday? Over. OK. Make sure you send the mats on as the truck will be there first shot. Also put on a Gilbertville bill. And a lease too? No. Certainly not. It is only 4 bales. That isn't all the truck has, is it? No. OK, I said to put the pro in a sealed envelope. You can only use a lease when the whole thing is. Yes, I get it. I made out a lease for the oil load and had Rose with a tractor already leased with signs.

The signs presumably referred to the placards required on leased vehicles by Commission regulations to show ownership and lessee.*

On November 8, 1955, the Commission employee again visited the Newton terminal and there observed a Nelson truck under lease to Gilbertville. The load included 14 bales of silk for which there were no shipping papers. Clifford Nelson being present, this was called to his attention, whereupon he called New York and thereafter a Gilbertville freight bill covering the silk was prepared.

*The testimony and exhibit on which the matter between these asterisks was based were ruled out of evidence by Division 4. (75 M.C.C. at 48)

Terminal and office facilities at Rockville-Ellington, Woonsocket and Newton, owned by Bergson, are jointly used by Nelson and Gilbertville; the former as primary lessee and the latter as a sublessee of the former. For these three and the terminal at Philadelphia, occupied only by Nelson, it pays Bergson total rentals of \$8,400 annually. The terminal space at New York, rented by Nelson from another carrier, is also jointly used by Nelson, Gilbertville and Byrnes. Monthly rentals paid are as follows:

	Since 1-1-1956		Prior to 1-1-1956	
	<i>Nelson to headford</i>	<i>Gilbertville to Nelson</i>	Same	
Long Island City	\$500	\$250	Same	
	<i>Nelson to Bergson</i>	<i>Gilbertville to Nelson</i>	<i>Nelson to Bergson</i>	<i>Gilbertville to Nelson</i>
Rockville-Ellington	\$275	\$400	\$275	\$50
Woonsocket, incl. use of telephone	100	100	100	25
Newton, incl. use of telephone	100	50	100	25

At Long Island City, Woonsocket, Newton, Philadelphia, Boston, Lowell, and Worcester, Nelson and Gilbertville have the same telephone numbers. The total costs of the leased interterminal telephone lines and the listings at the various terminals are approximately \$4,100 per month, paid by Nelson and \$400 of which is reimbursed to it by Gilbertville. At Rockville-Ellington, the same premises are occupied by Nelson, Gilbertville and Byrnes as headquarters and a terminal.

In October, 1954, Nelson sold to Gilbertville four tractors at \$200 each which had already been depreciated on Nelson's books to a salvage value of \$100 each. At another time, Nelson sold to Gilbertville two trucks.

Gilbertville's fleet is continually augmented by vehicles leased from Nelson. It usually has about three trucks and

two to three tractors on term leases (30 days or more) from Nelson; and, in addition, it usually leases from Nelson on a trip-lease basis from one to six complete units (tractors and trailers) and a couple of trailers each day. On rare occasions, Nelson leases vehicles from Gilbertville.

At the Gilbertville and Rockville-Ellington terminals, Gilbertville keeps lists of Nelson-owned vehicles described by type, registration, vehicle, and serial number and make to facilitate leasing. These lists and a pile of executed leases covering complete tractor-trailer units were observed by a Commission employee engaged in investigation. For convenience, printed form leases and vehicle inspection reports are used. On November 8, 1955, literally hundreds of executed leases were available for inspections by another Commission employee.

The terminal manager at Gilbertville explained to the commission employee that usually when either company handled a shipment destined for a point on the lines of the other, a vehicle was leased by the destination carrier from the other and the same driver was employed, thus enabling performance of an uninterrupted through movement.

On November 8, 1955, Gilbertville owed Nelson approximately \$19,000 in equipment rentals. For the period, January 1, to July 31, 1956, such rentals amounted to \$7,065.03. During an investigation at the Rockville-Ellington terminal, the Commission employees found that Gilbertville had on hand a complete file of doctor's certificate for all of Nelson's drivers, that in numerous instances the same driver was employed by both during the same payroll period, and that the drivers of both were using the same time-recording clock. They also observed a posted seniority list of Nelson drivers upon which appeared the names of five or six Gilbertville drivers. Names of Nelson drivers were found in Gilbertville records. At that time, Kenneth admitted that the same driver might be employed by both

companies during the same payroll period and even during the same day; that the duplication of drivers' medical certificates in the files of both companies was an industry practice and precautionary measure to insure compliance with the Commission's safety regulations.

At least 25 percent of the repairs on Gilbertville's vehicles are made by Nelson at Rockville-Ellington. Nelson pays its mechanics two dollars an hour, it charges Gilbertville three dollars an hour, and for parts cost plus 10 percent. The monthly cost of such repairs range from \$200 to \$400. Gilbertville maintains a mechanic at New York City. It also buys oil and motor fuel from Nelson at Newton.

It interchanges freight with many carriers; about 5 percent in terms of its total revenue, with Nelson, and another 4 to 5 percent with Byrnes. Points of interchange with Nelson are Monson, Gilbertville which is in the Town of Harwick, and Rockville-Ellington. Its division of interline revenues with Nelson is a constant 40 percent regardless of length of respective hauls. The evidence shows that divisions between carriers are customarily computed on a mileage pro rata basis and sometimes on a fixed percentage basis. At Rockville-Ellington, it was learned that Nelson did all of the billing on shipments interlined with Gilbertville, regardless of whether prepaid or collect and regardless of which carrier made delivery. On November 8, 1955, Nelson owed Gilbertville over \$39,000 for interline settlements. Since, as Kenneth testified, only about 5 percent of Gilbertville's operating revenues, which for the years 1953 through 1955 were \$616,544, the size of the indebtedness indicates an accumulation during the whole of the three years.

At various times and places, Commission employees in the performance of their duties observed some seven or eight instances of the movement of the shipments of oil

carrier by the other. Thus, it may be reasonably inferred that they engaged in the practice of commingling or pooling their shipments to suit their convenience.

FINANCIAL DATA

Balance sheets of Nelson and Gilbertville show:

NELSON

	<i>As of</i> 7-31-56	<i>As of</i> 12-31-55
ASSETS		
Cash	\$ 5,572	\$ 13,313
Notes receivable	3,732	3,820
Accounts receivable, less reserve for uncollectibles	70,815	86,475
Prepayments	27,095	18,594
Material and supplies	9,549	8,942
Total current assets	116,763	127,324
Tangible property (operating) net	444,650	294,295
Intangible property	0	0
TOTAL ASSETS	\$561,413	\$421,619
LIABILITIES		
Notes payable	\$ 13,563	\$ 20,000
Accounts payable	42,762	55,159
Wages payable	12,275	9,362
Accrued taxes	11,303	15,425
Total current liabilities	79,903	99,946
Advances payable (notes payable officers and not within 1 year)	46,527	16,298
Equipment obligations	269,955	152,806
Reserves (injuries, loss and damage, income taxes)	7,585	11,102
Total liabilities	403,970	280,152

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Capital stock	49,400	49,400
Surplus, including net profit, less taxes	108,043	92,067
TOTAL LIABILITIES AND CAPITAL	\$561,413	\$421,619

GILBERTVILLE

(As adjusted at hearing)

	<i>As of</i> 1-31-56	<i>As of</i> 12-31-55
ASSETS		
Cash in banks	\$ (4,508)	\$ 10,068
Accounts receivable, less reserve for uncollectibles	55,663	48,004
Prepayments	6,169	2,384
Material and supplies	0	2 0
Total current assets	57,324	60,536
Tangible property (operating) net	112,376	75,116
Land	4,175	
Intangible property		
Organization	150	150
Franchises, / less reserve for amortization	5,750	6,625
TOTAL ASSETS	\$179,775	\$142,427
LIABILITIES		
Accounts payable	\$ 32,543	\$ 50,622
Wages payable	14,334	5,575
Taxes accrued	14,335	9,681
Equipment obligations due within 1 year	38,399	18,207
Total current liabilities	95,581	84,085
Notes payable officers	20,095	19,597
Equipment obligations	34,423	14,764

Reserves (injuries, loss and damage, income taxes)	5,088	5,510
Total liabilities	\$155,187	\$123,556
Capital stock	100	100
Surplus (including net profit, less taxes)	24,488	18,371

TOTAL LIABILITIES AND CAPITAL \$179,775 \$142,427

Operating statements of the two carriers show the following revenues and net incomes:

NELSON

	Operating revenues	Net income or loss Before income taxes	After income taxes
1953	\$895,774	\$21,678	\$19,982
1954	889,420	8,206	2,637
1955	924,607	17,899	42,116
1956 to August 1	630,607	18,600	45,976

GILBERTVILLE

1953	\$ 75,489	\$22,830	\$20,314
1954	117,818	(1,158)	\$2,499
1955	123,237	4,573	2,065
1956 to August 1	444,777	9,588	6,117

It is noted that for the year 1953, Gilbertville's operating revenues were \$75,489; its administrative and general expense \$4,389, and net income \$20,314, whereas for the year 1954 its operating revenues climbed to \$117,818, its administrative and general expense to \$4,027, and its net income fell to a loss of \$2,499.

The "giving effect" balance sheet as of July 31, 1956, reflects the increase in Nelson's corporate shares from 500 to the 578 that would have been issued to Kenneth Nelson if consummation of the transaction had been effected on

that date, calculated according to the formula contained in the contract of August 18, 1955. It also shows that as of that date, the combined current assets of the two companies were \$174,087 against combined current liabilities of \$175,484, after an adjustment at the hearing to include \$38,329 in equipment obligations due within one year.

Consummation of the transaction will require no new borrowing and it is anticipated that Nelson will have no difficulty in financing its view of the projected combined net incomes and the increase expected therein through operating economies. Applicants indicated at the hearing that Nelson has no objection to the immediate writeoff of the amount assigned to its "Other Intangible Property" account as a result of the transaction, and, if approval is granted, it will be conditioned accordingly.

A "giving effect" operating statement for the first seven months of 1956 submitted by applicants shows anticipated savings approximating \$37,184 from various economies to result from unification of operations, thus increasing combined net operating revenues to \$77,500 for the unified operation with an operating ratio of 92.8 percent as compared with an operating ratio of 96.2 percent calculated upon the bare sum of the revenues from separate operations. The estimates of many of the items of expected savings are challenged by the rail carriers because applicants' witnesses were unable to provide sound or credible bases therefor, and because it is argued many of the economies have already been effected by operations under common control.

If the transaction is consummated, some employees will be re-assigned to reduce over-time wages; an additional employee will be assigned to safety work and another to claims supervision. All employees of both companies are to be retained. However, there will eventually be a reduction in the office staff of three employees by attrition. An

additional terminal may be established at Springfield, Mass., on land recently acquired by Gilbertville for terminal purposes; in part to eliminate considerable back-haul operation in the observance of gateways. The applicants do not believe that the merged operations will enjoy any substantial increase in freight tonnage beyond that handled by the two companies. The merger, they claim will benefit the public by producing one financially sound company able to provide a better service.

PROTESTANT AND OPPOSING MOTOR CARRIER PARTIES

The motor carriers protesting and opposing the application are common carriers, each operating under one or more certificates issued by the Commission. The evidence in behalf of ten of them, viz., Alvin R. Holmes, doing business as Holmes Transportation Service and or Jones Express, Worcester, Mass., Newburgh Transfer, Inc., Newburgh, N. Y., Taylor's Express Co., Haverhill, Mass., P. B. Mutrie Transportation, Inc., Waltham, Mass., H. T. Smith Express Co., Inc., Wallingford, Conn., National Transportation Company, Bridgeport, Conn., Lombard Bros., Inc., Waterbury, Conn., Downing & Perkins, Inc., Newington, Conn., Westchester Motor Lines, Inc., Tuckahoe, N. Y., and Jackson Transportation Corporation, New York, N. Y., was submitted by means of substantially similar stipulations and exhibits setting forth operating authorities, equipment operated, certain operating statistics, and locations of terminals. Each avers that it performs service throughout the territory covered by its operating authority. Each opposes the application because it believes that Gilbertville's operating authority is dormant, in part; that new competition would result from the proposed merger; and that granting the application would have an adverse effect upon it.

Holmes is authorized to transport general commodities with exceptions, over regular routes between specified

points in Massachusetts, on the one hand, and, on the other, specified points in New Hampshire, Vermont, Rhode Island, and Connecticut, and between certain points in such States other than Massachusetts; and general and specified commodities between points in Massachusetts, Rhode Island, Connecticut, and that part of New York and New Jersey within 20 miles of New York City. It maintains terminals at ten points in the States mentioned, except New York and Vermont; and operates 68 trucks, 54 tractors, and 101 trailers. Its operating revenues and ratios are as follows: For 1954, \$1,888,921, ratio 99.11; for 1955, \$2,064,860, ratio 98.05; and for 24 weeks ending June 15, 1956, \$1,072,543, ratio 99.96.

Newburgh Transfer, Inc., controlled by Holmes under temporary authority, claims authority so far as hereinafter, to transport general commodities, with exceptions, over regular routes between New York City and Philadelphia, Pa. It is not clear from an examination of its certificates that it has such authority. It operates 11 trucks, 10 tractors, and 26 trailers, and maintains terminals at Newburgh and Philadelphia, and uses the terminals of other carriers at Sayreville, N. J., and Colonie, N. Y. Its operating revenues and ratios are: For 1954, \$685,326, ratio 101.2; for 1955, \$255,924, ratio 122.2; first quarter of 1956, \$60,928, ratio 109.4.

Taylor's Express Co., also controlled by Holmes, is authorized to transport general commodities, with exceptions, over several regular routes between Boston and Haverhill, Mass., and between Haverhill and Lowell, Mass., serving certain intermediate and off-route points; and over irregular routes between Haverhill and Merrimack, Mass., on the one hand, and, on the other, points in Rockingham and Stratford counties, and a portion of Hillsboro County, N. H.

³ Operating ratios are stated in percentages of carrier operating expenses to carrier operating revenues.

It maintains a terminal at Haverhill, and, jointly with Holmes, at Lowell and Cambridge, Mass., and operates 15 trucks, 4 tractors, and 7 trailers. Its operating revenue, and ratio are: For 1954, \$214,875, ratio 97.3; for 1955, \$202,069, ratio 96.3; for 24 weeks ending June 16, 1956, \$102,028, ratio 98.7.

Mutrie opposes the application principally to the extent that it would authorize Nelson as the surviving carrier, to transport machinery or liquid commodities in tank vehicles. Mutrie transports such commodities to the extent authorized by its certificates. Insofar as here pertinent, it is authorized to transport general commodities over regular and irregular routes between certain points in Massachusetts, including Boston, and certain points in Rhode Island, Connecticut, Maine, New Hampshire, and New York, including New York City, between New York City and points in New Jersey within 50 miles thereof, and many different liquid commodities generally between points in an area extending from and including the New England States southward through New York, Pennsylvania and New Jersey to and including a portion of Delaware. It maintains terminals at Waltham, Mass., Wallingford, Conn., Manchester, N.H., Woodbridge and Jersey City, N.J., and Pawtucket, R.I.; operates 391 trucks, trailers, tank vehicles, low-bed, platform and pole trailers, etc., its investment in which is approximately \$2,827,040. It employs 246 persons. Its gross revenues and operating ratios are: For 1954, \$3,013,885, ratio 96.7; for 1955, \$3,463,547, ratio 96.9; and for 1956 to July 1, \$1,740,587, ratio 98.7.

Smith is authorized to transport, over regular routes, general commodities, with exceptions, between Meriden and Boston, Carteret, N. J., and four points in Connecticut, between Hartford, Conn., and Sturbridge, Mass., and between Waterbury and Bridgeport, Conn.; over irregular routes, between points in Connecticut, and between Meriden, on the

one hand, and, on the other, nine points in Massachusetts, Passaic, Paterson and Newark, N. J., and points within ten miles of the latter, and Albany, N. Y., and points within ten miles thereof; over irregular routes, heavy machinery, between points in Connecticut, and between Meriden, on the one hand, and, on the other, points in New Hampshire, Massachusetts, Rhode Island, New York, Pennsylvania and New Jersey. It has terminals at Wallingford, New York City and Boston, and operates 6 trucks, 41 tractors, and 75 trailers. Its operating revenues and ratios are: For 1954, \$1,194,899, ratio 98.4; for 1955, \$1,216,426, ratio 99.6; for first quarter of 1956, \$316,126, ratio 96.

National is authorized to transport general commodities, with exceptions, over regular routes between Perth Amboy, N. J. and Hartford serving all intermediate points and the following off-route points: Five in New York, 22 in Connecticut, 6 in Massachusetts, points in Bergen, Essex, Hudson, Union, portions of Passaic and Middlesex, counties, in New Jersey, and points in the New York commercial zone as defined by the Commission; between certain points and off-route points in Connecticut; between New Freedom, Pa., and junction of U. S. Highways 1 and 9, serving, among others, the intermediate points of Baltimore, Camden, and Philadelphia; and finally between certain other points in Connecticut, Massachusetts, and New York. It maintains terminals in Boston, Holyoke, Mass., Hartford, New London, Conn., Bridgeport, Kearney, N. J., Baltimore, Philadelphia, and Lancaster, Pa., and operates 40 trucks, 90 tractors and 150 trailers. Its operating revenues and ratios are: For 1954, \$2,730,157, ratio 100.4; for 1955 \$2,894,374, ratio 98.9; for the first quarter of 1956, \$804,374, ratio 99.0.

Lombard is authorized to transport general commodities, with exceptions, over regular routes generally between numerous specified points, serving numerous intermediate and off-route points, in an area extending from Marcus

Hook, Pa., northward to and including Massachusetts. The area includes parts of Pennsylvania, New Jersey, New York, Connecticut, Rhode Island and Massachusetts. It has terminals at Philadelphia, Elizabeth, N. J., Bridgeport, Waterbury, South Windsor, Conn., Worcester and Boston, and operates 38 trucks, 103 tractors and 128 trailers. Its operating revenues and ratios are: For 1954, \$2,561,004, ratio 100; for 1955 \$2,580,000, ratio 100.3; for the first quarter of 1956, \$779,771, ratio 100.9.

Downing is authorized to transport general commodities, with exceptions, over regular routes between Hartford, Conn., and Lancaster, Pa., serving all intermediate points, and certain off-route points in New Jersey and Pennsylvania, and over irregular routes between points in Connecticut, Massachusetts, a portion of Rhode Island, southeastern New York, and portions of New Jersey and eastern Pennsylvania. It has terminals at Newington (Hartford), Conn., Worcester and Philadelphia, and operates 20 trucks, 40 tractors, 60 trailers, and 8 flatbeds. Its operating revenues and ratios are: For 1954, \$1,047,155, ratio 98.9; for 1955, \$1,148,710, ratio 102.3; and for the first quarter of 1956, \$360,369, ratio 102.4.

Westchester is authorized to transport over regular routes new furniture and certain toys from certain points in Massachusetts to certain points in New York and New Jersey including service to such intermediate points as New York City, Jersey City, Albany, Hartford and Meriden and four off-route points in Massachusetts and New York; over irregular routes, special commodities, such as ladies and children's wearing apparel, new furniture, baby and doll carriages, paint and paint products, and household goods, from, to and between points generally in portions of Pennsylvania, New Jersey, New York, Connecticut, Massachusetts, Vermont, and Rhode Island, and general commodities, with exceptions, between New York City and

Westchester County, on the one hand, and, on the other, points in Fairfield County, Conn. It operates 20 tractors and 24 trailers.

Jackson is authorized to transport over irregular routes, new furniture between New York City and points in New York and Connecticut within 50 miles of Columbus Circle, in that city, and between New York City, on the one hand, and, on the other, Philadelphia and points in New Jersey. It operates 3 trucks, 10 tractors and 14 trailers.

M & M Transportation Company, of Boston, is interested here only in the territory extending from, and including, Rhode Island and Massachusetts on the north to and through New York City to points south thereof. It is not interested in local services between points in Massachusetts, Rhode Island and Connecticut. It is authorized to transport over eight regular routes general commodities, with exceptions, between Boston and Philadelphia serving specified intermediate and off route points in Massachusetts including Springfield, Worcester and 20 mile area, and 35 mile Boston area, Connecticut, including Hartford and New Haven, Rhode Island, including Providence and points in Rhode Island and Massachusetts within 20 miles thereof, Hudson and Kingston, N. Y., Camden, N. J. and points in New Jersey and Pennsylvania within 30 miles of City Hall in Philadelphia, New York City, points in three New Jersey counties, portion of Long Island, Newark, N. J., and points within 25 miles thereof; over regular routes, fish and fish oils from Barnstable, Mass., to New York City; packing-house products from Boston to Baltimore and between Plymouth and Barnstable, Mass., and New York City; and cranberries from Plymouth and Barnstable to New York City. It maintains terminals with a supply of over-the-road equipment at New York City, Newark, Philadelphia, Springfield, Providence, Worcester and Boston, and operates 190 tractors, 258 trailers and 73 pickup trucks, supplemented

by an average of four leased units per work day. Its investment in transportation facilities, equipment and terminals was \$2,188,407 as of January 1, 1956. It employs 850 persons, including 12 solicitors. Its operating revenues and ratios are: For 1954, \$7,481,186, ratio 92.5; for 1955, \$7,233,531, ratio 95.8; for the first six months of 1955 and 1956, respectively, \$3,602,497, ratio 95.96, and \$4,330,149, ratio 91.74. M & M provides daily overnight service on both truckload and less-than-truckload shipments between all points. It can meet the public demand for its services and has experienced little complaint. Its assistant traffic manager expressed little more than an awareness of the existence of Nelson and Gilbertville, and testified that M & M is very much interested in the application to the extent that it "would be seriously affected by any new competition in a field already overburdened with competitive factors"; and that there may be 65 to 70 general-commodity-common-motor carriers operating between points in Massachusetts in which M & M is interested and the New York area.

Insofar as pertinent here, Adley Express Company, New Haven, Conn., is, generally speaking, authorized to transport general commodities, with exceptions over some 30 regular routes between Boston and Philadelphia through Connecticut, Rhode Island, New York and New Jersey, serving all intermediate points and as off-route points all points in Massachusetts, Rhode Island and Connecticut, in twelve counties in northern New Jersey, within 15 miles of City Hall, Philadelphia and in the New York commercial zone. It has thirteen terminals and 25 call stations within the area here involved, and operates 205 trucks, 229 trailers and 418 trailers, some of which are stationed at each terminal. Its investment in terminals, equipment and facilities as of January 1, 1956, was \$6,644,894. It employs 1,300 persons, including 40 solicitors. Adley's operating reve-

ness and ratios are: For 1954, \$9,479,787, ratio 89.4; for 1955, \$10,355,065, ratio 94.3; for the first six months of 1956, \$5,635,578, ratio 89.68. It provides overnight service on both truckload and less-than-truckload traffic between all points pertinent here. During 1955 it handled 195,646,443 pounds, and during the first 6 months of 1956, 104,639 pounds, of freight between points in Massachusetts, on the one hand, and, on the other, points in New Jersey, and Philadelphia and points in Pennsylvania within 25 miles thereof. In this proceeding, it is interested in the intra-New England traffic and that in the area extending southward therefrom to the New Jersey area and Philadelphia. It has experienced some competition from Gilbertville and Byrnes, but not to any extent. There are some 50 or 60 competitive general commodity motor carriers between Massachusetts and Philadelphia. In the Massachusetts-Rhode Island-Connecticut area, there are at least 100 such competitors, about 20 to 25 of whom are substantial. Adley recently acquired the Savage Truck Line operating rights, thus extending its authority south from Philadelphia to Virginia and North Carolina.

Hemingway Brothers Interstate Trucking Company, New Bedford, Mass., is authorized, insofar as pertinent, to transport general commodities, with exceptions, over regular and, in part, irregular routes in the general area from Philadelphia northward served by Adley. Their operations are substantially parallel, except that Hemingway serves New York City and Adley does not. Hence, their interests in the application are substantially the same. It was stipulated that Hemingway's witness would, if called to testify, give substantially the same answers to questions as those given by Adley's witness. Hemingway maintains 15 terminals with road equipment and 62 call stations, in all, the vast majority of which are in the area affected. It operates 98 trucks, 242 tractors and 384 trailers and employs 903

persons. Its investment in terminals, equipment and other facilities as of January 1, 1956, was \$2,626, 270 against which the outstanding obligations were \$837,766. Its operating revenues and ratios are: For 1954, \$7,577,087, ratio 96.53; for 1955, \$7,476,846, ratio 97.7; and for the first six months of 1955 and 1956, respectively, \$3,814,008, ratio 99.43, and \$4,242,471, ratio 97.84. It has lost some traffic to Gilbertville destined from two points in New Jersey to points in Massachusetts, most of which it has regained. It attracts business from Gilbertville and other carriers and they from it. Hemingway has acquired extensive operating authority by several purchases.

MC-F-6178

In MC-F-6178, the Bureau of Inquiry and Compliance asserts that the over all picture presented by the evidence amply demonstrates that Nelson and Gilbertville and the other respondents have violated the prohibitions in section 5 against control or management in a common interest of two or more carriers and that the application for approval of the merger is merely a tardy attempt to secure approval of an already unlawfully accomplished condition and that while individually the various incidents and circumstances shown by the record may not be conclusive, collectively, they clearly spell out a continuous existence, since the acquisition by Kenneth Nelson of the Gilbertville shares, of management and operation of the two carriers in a common interest. The Bureau, therefore, recommends a finding that the circumstances revealed by the record require the entry of an order calling upon the respondents to discontinue violation of the provisions of section 5(4) of the act. Although the motor carrier protestants and the motor carrier and railroad parties in interest proclaim their support of the investigation and argue that respondents are in viola-

tion of said section, none introduced evidence thereof and none has requested the entry of any corrective order.

Applicants-respondents argue that the leasing of trucks by one carrier to another; the presence of a list of equipment of the lessor carrier in the files of the lessee carrier to facilitate leasing; the sharing of telephones; and the friendly business relations between carriers engendered by close family relationship, do not constitute control in a common interest; that the few instances of record of the carriage by one carrier respondent of shipments of the other should be ascribed to human error and not given serious consideration; that Kenneth Nelson's continued employment by Nelson as a tariff consultant in 1933 concurrently with his management and operation of Gilbertville did not result in common control or management of the two carriers.

The pertinent part of section 5(4) provides that

"(4) It shall be unlawful for any person, without the approval and authorization of the Commission, to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, xxx, in any manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated xxx in violation of the foregoing provisions. As used in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management."

Paragraph (5) of section 5 declares that any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two or more carriers if such transaction -

(a) is by a carrier and its effect is to place such car-

rier together with persons affiliated with it in control of another carrier;

(b) is by a person affiliated with a carrier and the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) is by two or more persons acting together, one or more of whom is a carrier or affiliated with a carrier, and its effect is to place such persons and carriers and persons affiliated with such carrier or carriers in control of another carrier.

Paragraph (6) of section 5 provides that "a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier xxx it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person, will be managed in the interest of such other carrier." Section 1(3)(b) of the act declares in pertinent part that for the purposes of section 5, the word "control xxx shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation xxx or through or by any other direct or indirect means and to include the power to exercise control."

In *Colletti Control—Comet Freight Lines (1942)*, 38 M.C.C. 95, the Commission found that a transaction whereby a person in control of a carrier through ownership of 60 percent of its voting stock would become manager of the business of another carrier was subject to the provisions of section 5. In that case the scope of the word control was discussed:

"Section 5 is remedial in character and should be liberally construed. It is clear that the section was intended to cover acquisitions of control by any means and irrespective of whether or not the person holding

control might legally enforce such control. 'Control' is generally defined to be the power or authority to *manage*, direct, superintend, restrict, regulate, govern, administer, or oversee. Control is frequently said to be synonymous with manage. There is nothing in the act to indicate that the term is used in other than its ordinary sense. It is obvious that there may, and do, exist different types of control. For instance, there may be absolute control which would imply complete dominion over the subject matter; or there may be joint control as where two persons have equal power thereover; there may be direct or indirect control; or there may be actual as distinguished from legal control. The words 'control or management' as used in section 5 embrace all forms and types of control or management. *** The existence of legal control in one person does not prevent concurrent existence of actual control in another through acquiescence of, or a management contract with, the former. The fact that Colletti, theoretically at least, would be subject to the orders of Comer's board of directors does not negative possession by him of actual control within the meaning of the statute." 38 M.C.C. 97.

The history of the broad language contained in section 1(3)(b) and in paragraphs (4), (5) and (6) of section 5 makes it clear that the existence of control must be determined by a regard for the "actualities" of intercorporate and intercarrier relationships and that by investing the Commission with the duty of ascertaining control, Congress did not imply artificial tests of control. One of the kinds of transaction specified in section 5(5) which shall be deemed to accomplish or effectuate the control or management of two carriers in a common interest is a transaction by a carrier, resulting in such carrier and persons affiliated with it, taken together, acquiring control of another carrier.

The definition of affiliation in section 5(6) assumes that the person with respect to whom the question of affiliation arises will acquire control of the carrier in question; but continues with the statement that affiliation of such person with another carrier shall be found if it is reasonable to believe that the carrier, control of which has been or will be effected by such person, will nevertheless be managed in the interest of such other carrier. The definition recognizes that control of the carrier by the person in question does not negative the coexistence of his affiliation with the other carrier. Both may be present and it does not imply affirmative domination of the person by the carrier with which he is affiliated. The term "managed" obviously means "managed in any material degree." *Greyhound Corp.—Investigation of Control—Southern Limited (1946)*, 45 M.C.C. 59, 77-79.

Paragraphs (4), (5) and (6) were planned by Congress in the light of what had theretofore been done through myriad devices without Commission supervision. They are necessary because of the difficulty in establishing as a matter of law in many cases where as a matter of fact it is known that control or management in a common interest of two or more carriers is effectuated or actually exists. *Id.*, p. 77.

Webster's New Collegiate Dictionary defines the verb "manage" as "To control and direct; to conduct, guide, administer" and "To direct affairs; to carry on business or affairs"; and the noun "management" as "conduct; control; direction."

The case in hand appears to be on the borderline. Nevertheless, taking into view all of its many facets in the broad and penetrating light of the statute and its past application, a reasonable conclusion is impelled that control and management of both Nelson and Gilbertville in a common interest were effectuated at some time which cannot be

determined on this record and are presumably continuing. Family ties, of themselves, are not evidence of action to a common purpose. However, the natural and commendable impulse of a member of a family to cooperate with other members in business affairs as in other fields may push the cooperation beyond the permissible bounds of remedial legislation. The family tie provides an urge in addition to the profit motive. Family cooperation, therefore, suggests some scrutiny of the inter-relationship of family enterprises in the administration of such legislation as section 5 of the act. There is no doubt that the individual respondent, members of the same family, were affiliated with Nelson or Gilbertville.

Mrs. Linnea Nelson and two of her sons, Oscar and Charles, set up the business of Nelson in 1930. Upon incorporation of the business in February 1948, 496 of the 500 shares authorized were issued to her and one of each four sons, Oscar and Charles, Clifford and Kenneth Nelson. About three months later, she distributed 196 of her shares equally among the sons so that each then had 50 shares. After her death, bequests of 42 shares each were distributed from her estate to each of her seven children, and the corporation bought the six remaining shares. On June 30, 1951, and early in 1953, Oscar sold his 50 and 42 shares, respectively to Charles. On September 22, 1951, and in early 1953, Kenneth sold his 50 and 42 shares, respectively to Clifford. Both Oscar and Kenneth resigned as officers and directors upon the sale of their shares in 1951. Charles and Clifford, having acquired shares from the other devisees, have been and now are the owners of 45.75 percent of the shares outstanding, or 226 each. The other 42 shares are held by a sister, Greta Nelson Carlson.

The sale by Kenneth of his shares and his resignation from office in September 1951, did not mark severance of his connection or affiliation with the company. Apparently,

he continued to occupy office space at Nelson's headquarters in Rockville-Ellington. As a "free lance" tariff consultant he was employed and paid by Nelson over \$15,000 in 1952 and over \$13,000 in 1953; payments being made upon bills presented periodically by Kenneth. The nature and extent of the services, if any, rendered to Nelson does not appear of record. Nelson was Kenneth's only client.

In January 1953, while still consultant for Nelson, he became interested in, and advised with one, Solomon, his accountant and financial adviser, concerning the purchase of all of the capital stock of Gilbertville. Solomon was also accountant and financial adviser for Nelson and the Nelson-Chilberg family and for Gilbertville and Byrnes after they were acquired. On March 1, 1953, Kenneth took control of, and began to operate, Gilbertville. In July 1953, with the help of Oscar's name as co-maker on promissory notes, he financed and completed the purchase. Kenneth became the president and Oscar, to whom 48 shares had been transferred, presumably at Kenneth's direction, became treasurer. A qualifying share was issued to Kenneth's attorney. On April 1, 1954, Oscar who had paid nothing for the 48 shares, transferred them to Kenneth who, in turn and without receiving any consideration, transferred 24 to his wife Phyllis and 24 to Gilbertville's terminal manager at Gilbertville to enhance his "prestige". Kenneth, nevertheless, acknowledged that he beneficially owns and controls such shares. At the same time, Oscar resigned as treasurer and director, and shortly thereafter the terminal manager was elected a director and Kenneth as treasurer (in addition to the presidency). Oscar thereafter devoted himself to the operation of his garage at Philadelphia, which, incidentally, is patronized by Nelson.

Since Gilbertville's "administrative and general" expense for 1953 amounted to only \$4,389.37, and since its net after taxes in that year was \$20,314.36, a reasonable

inference may be drawn that Kenneth received little or nothing as salary in that year, and, consequently, that his "earnings" of over \$13,000 as tariff consultant to Nelson were in the nature of a subsidy to Gilbertville. To offset such an inference we have the statement of the accountant that a portion of the \$20,059 shown on its 1953 balance sheet as "Notes payable officers" represents in part unpaid salary owing to him. Even so, the Nelson payment to him in 1953 was at least the equivalent of a loan, without interest, to Gilbertville since it received Kenneth's services without any outlay therefor in that year.

When Kenneth took control of Gilbertville on March 1, 1953, after advising with his accountant and financial adviser, it had a deficit of \$39,868. As of December 31, 1953, its assets amounted to \$69,383 and liabilities to \$80,117 (after net income of \$20,314 after taxes), with a net worth of \$18,935. The accountant-financial adviser testified that because of Gilbertville's "precarious" financial condition, poor credit standing and insufficiency of working capital, he volunteered advice in January 1954, to Kenneth to seek a merger with Nelson. Thereafter, he repeated his advice, and spoke to Charles Chilberg, president of Nelson of the possibility of such a merger. He suggested merger with none other than Nelson because he knew it was susceptible to a "merger deal" since Charles and Clifford were interested in the expansion of routes to the south. Notwithstanding Gilbertville's "precarious" condition, activity with respect to the suggested merger was suspended while arrangements for two acquisitions were made. By April 28, 1954, arrangements had been made for the purchase by Gilbertville of the operating rights of Louis Marmer, doing business as Wolff's Express, for \$7,500 in cash. Pursuant to approval of the transaction by the Commission on June 16, 1954, it was consummated and the purchase price was entered in Gilbertville's books as an intangible asset.

to be amortized. In April or May of 1954 Charles Chilberg and Clifford Nelson negotiated the purchase by them of the capital stock of Byrnes, which after approval by the Commission in MC-F-5749 was finally consummated August 21, 1956, with the understanding that after certain tax advantages have been exhausted Byrnes will be merged with Nelson. Meanwhile, Charles and Clifford had been operating Byrnes under temporary authority. Byrnes' general commodity authority complements that held by Gilbertville after its acquisition of Mariner's operating rights. By interchange, Byrnes and Gilbertville can provide a through general commodity service between points in Massachusetts, Rhode Island and Connecticut, on the one hand, and, on the other, points as far south as the District of Columbia.

The accountant adviser testified that when he spoke to Charles Chilberg about the merger in April 1954, he drew attention to the operating economies that could be expected through the elimination of duplications. However, since Gilbertville was running a deficit in earned surplus and Nelson was apparently financially sound; it is not a violent assumption that Kenneth, Charles and Clifford as early as the forepart of 1954 saw in the merger financial advantages to Gilbertville's owner to whom it was much indebted and the fulfillment of Nelson's ambitions to expand to the south with the aid of the Byrnes' operating rights, if, indeed, Nelson's or the Nelson-Chilberg ambitions to expand had not originally motivated the purchase of Gilbertville by Kenneth. Gilbertville's financial condition at that time was certainly not such as to make it attractive as an investment. As of December 31, 1953, it owed Kenneth \$11,792 which had increased to \$15,024 by December 31, 1954, and to \$20,095 by July 31, 1956. Moreover the promissory note of \$30,000 to the Bank signed by Kenneth and Oscar is still unpaid. Another advantage is

that the merger will enable Nelson to transport its narrow range of commodities throughout Gilbertville's general commodity authority areas.

Activities to effect the merger were resumed in January 1955, at a conference between Kenneth Charles, Clifford, their attorney and the accountant adviser. On August 18, 1955, the merger agreement was signed and in October 1955, the instant application was filed.

In dealing with the fitness of Nelson to succeed and to exercise Gilbertville's operating rights, some of the opposing motor carriers argue that in order to "condition" the operations of the latter to be acceptable, Nelson sacrificed some of its traffic to Gilbertville and that this circumstance is evidence of management and control in a common interest. They point to the rapid expansion in Gilbertville's operating revenues from \$75,489 in 1953, to \$423,237 in 1955 and to \$444,773 in the first seven months of 1956 as compared with the slower increase of Nelson revenues from \$895,774 in 1953 to \$924,607 in 1955 and to \$630,607 in the first seven months of 1956. Some of the opposing carriers also assert that of the 1,369 shipments shown on exhibit 26 as moved by Gilbertville, approximately 461 or 33 percent consisted of basic textile commodities such *inter alia* as nylon, cotton, cotton piece goods, etc. However, an examination of the exhibit in the light of Nelson's narrow commodity operating authority materials used in the manufacture of cloth, waste materials, resulting therefrom and supplies and materials used in the transportation or processing of such commodities when moving to or from places of processing and its limited areas of origin and destination discloses that no more than 15 percent of the shipments could reasonably or lawfully have been transported by Nelson. It is doubtful that Nelson sacrificed much, if anything, in the way of business to build up Gilbertville. However, it may reasonably be in

ferred from the phenomenal growth in its revenues that Charles Chilberg and Clifford Nelson and other members of the Chilberg-Nelson family extended a helping hand to Gilbertville in the development of its custom.

An appraisal of the matters related above beginning with the employment of Kenneth by Nelson as a "tariff consultant" after severance of his connections as an officer and share-holder is persuasive that an overall plan or project to create a larger and more significant motor carrier in the New England-Middle Atlantic area using Nelson as a nucleus was conceived and followed. Whether it was conceived before or at the time Kenneth negotiated for purchase of Gilbertville or at some later time is not revealed. Certainly, it commenced to take shape in April or May of 1954 when the Byrnes and Marmer acquisitions first received attention. At any rate, events and the interrelations of the respondent carriers following the purchase of Gilbertville mark their operation as that of a unified organization.

Nelson provides a pool of equipment to which Gilbertville constantly, frequently and readily resorts by means of handy lease forms. Both draw upon the same group of drivers, whose names and other information concerning them were for convenience kept in the files of both. Both occupy the same headquarters and, with few exceptions, use the same telephones. Of a total of six terminals between them, both occupy the same terminals at four points. Three are under lease from Bergson. At two of the four, Gilbertville pays its share of the rentals, at the other two it pays the entire rental. For economy or convenience they carry one another's shipments. It is clear that each operates under some managerial direction from officers or employees of the other. The divisions of revenues on traffic interchanged between them is upon a fixed percentage basis. Nelson does all of the billing on such traffic. By ar-

arrangement, interchange of traffic between them is effected by an "interchange" of equipment under lease, whereby the same vehicle and driver accomplish the through movement under leases prepared in advance of such interchange. To some extent Nelson repairs and services motor equipment owned and operated by Gilbertville. Their accounting services and financial advice come from the same source. They are extremely liberal one with the other with respect to debit balances. As of November 8, 1955, Nelson owed Gilbertville approximately \$39,000 for inter-line settlements and Gilbertville owed Nelson some \$19,000 in equipment rentals. It may be reasonably inferred that, upon consummation of the merger, if approved, Kenneth Nelson will again join Nelson as a responsible officer or employee. Charles Chirberg, under questioning neither affirmed nor denied that probability, and it is noted that the elimination of Kenneth's salary as president of Gilbertville was not listed among the economies to be effected by the merger.

Although no one of the foregoing acts, practices and arrangements affords a clear indication of control or management in a common interest, they, together with the acquisitions referred to above and the circumstances surrounding them, require a finding that control and management in a substantial degree of Nelson and Gilbertville in the common interest of Nelson and its shareholders and of Gilbertville and its shareholders have been accomplished or effectuated and presumably are being maintained. *Greyhound Corp. Investigation of Control - Southern, Ltd.* (1946), 45 M.C.C. 59, 79; *Ratner - Investigation of Control - Nowak Trucking Co.* (1944), 55 M.C.C. 104, 109-110.

MCF 45099

Protestants, including the rail carriers, and the other opposing motor carriers urge denial of the application

for the reason that the proposed merger would not be consistent with the public interest because (1) Nelson is not fit to perform the service under the merged operating rights, and (2) the transaction would result in the creation of a new or different service without showing a need there for to compete with the established services of protestants and other opposing carriers. The Bureau of Inquiry and Compliance urges denial only upon the ground of want of fitness. Nelson's unfitness is demonstrated, it is said, by the participation of itself and those who control it in accomplishing or effectuating control or management in a common interest in violation of section 5(4) and by Nelson's violations of the act in other respects and of the Commission's safety and other regulations. Mutrie, Holmes, Newburgh and Taylor urge denial, but request that if approval is granted it be conditioned upon the cancellation of all regular route and certain irregular route authority contained in Gilbertville's certificate as dormant. Applicants respondents maintain that past violations, if any, do not constitute a bar to the approval of a transaction such as here proposed.

The violations, other than of section 5, as shown by the record, consisted of one instance of destruction of records, about four instances of failure to submit drivers' logs for inspection by Commission investigators, two of failures by drivers to keep their logs properly, and two of driver failure to keep logs, one of failure to require a doctor's certificate of a driver, approximately six of failure to have certain safety equipment on trucks or to keep trucks in safe operating condition, several of operations beyond operating authority by both carriers through failure to observe proper gateways, through carriage of unauthorized commodities or by operation beyond the authorized routes or territory of the carriers. Such violations were discovered during the course of investigations on about

ten scattered days between October 22, 1954, and June 1, 1956, by Commission employees. Appellants' respondents offer in mitigation the statement that when such violations were drawn to Kenneth Nelson's attention, corrective action was taken. However, many of the described violations were committed by or are ascribable to Nelson.

It is true that the Commission has on many occasions found that past violations of the act and the regulations by an applicant are not a bar to the granting of his application for a certificate or of approval of an application under section 5. In *Luberman Extension of Operations*, *Michigan* (4948), 48 M.C.C. 339, 402-404, the violations of record were many and varied, but upon consideration of all of the evidence the Commission found applicant fit. In *Biss & Co., Inc., Extension*, *Explosives* (4955), 64 M.C.C. 209, certain applicants were found fit, notwithstanding previous violations, the Commission stating at page 350 that:

"There is no inflexible rule by which an applicant's fitness can be determined. Consideration should be given to the nature and extent of past violations of our safety rules and regulations, and of State and city laws and regulations; the effect of such violations upon uniform regulation; the mitigating circumstances shown to exist or to have existed; whether the carrier's past conduct represents a flagrant and persistent disregard of the provisions of the act and our rules and regulations thereunder, and the extent to which the carrier is attempting to take corrective measures to bring its operations in compliance with the law and regulations."

In *Baggett-Control-Walker Hauling Co., Inc.* (4955), 65 M.C.C. 522, approval of a transaction under section 5 was granted, although control had previously been accomplished in violation of that section. Therein, it was written:

It is apparent that the parties have, for all practical purposes, consummated the major portion of the transaction, with a purchase price of \$1,000,000, reserving for our consideration and approval only the remaining portion involving the purchase of 5 shares of stock for \$675, which, obviously, is of little consequence so far as the terms and conditions of the whole transaction and the requisition of control of the carrier are concerned. xxx The evidence otherwise shows the transaction to be in the public interest, and denial is not warranted solely because of the law violation; but our approval is not to be understood as a condonation xxx

In the case at bar, there is no evidence of extensive or flagrant violations of either the act or the regulations. The violations shown and the circumstances in which they occurred do not establish a persistent disregard for regulation. Rather, they appear to be the result in some cases of ignorance of the requirements, and in others of a degree of carelessness and not wilfulness. The principals are youthful and are of such caliber that their experiences at the hearing herein can be expected to make them more conscious of and responsive to regulation. They earnestly deny that what has been done in respect of Gilbertville and Nelson amounts to effectuation of control in a common interest and on this record their view on that point cannot be said to be wholly groundless. Such control is not the result of any one act or transaction, but is the result of an evolution and a cumulation of acts, transactions and practices, the ultimate consequence of which may not be readily obvious to the layman. A finding of unfitness by reason of violations is not warranted.

Adley, M & M, and Hemingway maintain on brief that approval would result in the creation of a new general commodity operation extending between all points in Mas-

achusetts, Connecticut and Rhode Island through appropriate gateways, on the one hand, and, on the other, points in New Jersey, Philadelphia and surrounding area, defined areas in Maryland and Delaware and in and around the District of Columbia. It is pointed out that Nelson operations are confined by its certificate to a very limited class of commodities in the textile field within the foregoing area, and that the new operation to emerge from the unification of the operating rights of Byrnes and Lewis Marmore, both lately acquired by the applicants, would bear little, if any, resemblance to the very limited operations conducted under the various rights previously in separate ownership. Adley et al., by an analysis of an exhibit placed in the record by Gilbertville upon which are listed approximately 1,400 shipments handled by it between May 1 and May 11, 1956, attempt to show how the pattern of its operations has already changed since its acquisition by Kenneth Nelson on March 1953 from intrastate in Massachusetts and intra-New England to the New England-New York City area. M & M. Adley and Hemmingsway assert that collectively they provide service between all major areas involved in the application and that they have experienced no serious competition from Gilbertville. Nothing is said concerning any competition experienced from Gilbertville-Byrnes operations between the New England area and the New Jersey, Pennsylvania, Maryland, District of Columbia areas.

Mitrie, Holmes, Newburgh and Taylor, in their brief, also contend that Gilbertville's pattern of operations has changed and that approval would engender a new service unlike the previous services without any proof of public need therefor. Holmes holds cross-haul authority to transport general commodities between all points in Massachusetts, Rhode Island, Connecticut and New York City and points within 20 miles thereof. Thus, operations in-

stituted under Gilbertville's certificate are claimed to be competitive with and detrimental to Holmes' operations and are new competition inspired by Gilbertville while in violation of section 5 of the act. Also, it is said, approval would authorize a new operation and new competition by Nelson between Massachusetts and Rhode Island points and Philadelphia in direct competition with the Holmes-Newburgh through service. As already mentioned, it is not clear that Newburgh's certificate authorizes operation by it between New York City and Philadelphia.

None of the other six opposing motor carriers filed briefs but announced at the hearing their opposition upon the general grounds that each operates to the extent of its operating authority, each believes Gilbertville's operating authority to be dormant in part and that the new competition to result from the merger would have an adverse effect upon it.

The eastern territory railroads say that the merger would enlarge Nelson's operating authority to some extent territorially and give it a vastly expanded commodity authority without proof of public need; that existing motor carriers are providing adequate service and that the application should be denied for these reasons, in addition to that for lack of fitness.

The evidence indicates that there are some 50 to 60 general commodity motor carriers competing for traffic between Massachusetts and Philadelphia, and at least 100 such carriers, 20 to 25 of whom are substantial, competing in the Massachusetts-Rhode Island-Connecticut area.

The difficulty with the basic opposition is that the competition which is feared is either already an accomplished fact or capable of becoming so even through the present application is denied. Gilbertville could still continue its operations under its general commodity authority intra-New England and between that area and the New York

City New Jersey areas. It could still inaugurate, if it has not done so already, or continue interchange with Byrnes in the New York City area, providing through service between the New England points and those south of New York City. Denial of the application would not frustrate such competition.

Moreover, the competition is handicapped and would continue to be notwithstanding approval of the application by the requirements for observance of Gilbertville's principal present gateway restrictions. To provide service under general commodity authority between Massachusetts points, on the one hand, and, on the other, New York City and points in New York and New Jersey within 20 miles thereof, all operations must be conducted through the Town of Hardwick. Between any point in Massachusetts and any point in Rhode Island or Connecticut operations must pass through Palmer or within 10 miles thereof. Service may not be provided between any point in Rhode Island or Connecticut, on the one hand, and, on the other, New York City or any point in New York or New Jersey within 20 miles thereof without operations through that part, if any, of the Town of Hardwick situated within 10 miles of Palmer. *Actua Freight Lines, Inc., Interpretation of Certificate (1978)*, 48 M.C.C. 610; *La Mer and Conroy-Purchase-Ziffren (1979)*, 55 M.C.C. 501, 511. Through service, under Gilbertville's general commodity authority, except insofar as it may now lawfully be provided by interchange with Nelson, may not be provided between Rhode Island and Connecticut. *G. & M. Motor Transfer Co., Inc., Common Carrier Application (1944)*, 43 M.C.C. 497, 500.

The evidence shows a tremendous increase in Gilbertville's business from 1953 when operating revenues were \$75,489 as compared with the first seven months of 1956 when they were \$444,777. Notwithstanding, none of the op-

posing carriers offered evidence of any loss of traffic by them to Gilbertville from 1953 to August 1956. Mutrie and Holmes as well as Adley, M & M and Hemingway are of the opinion that this increase in traffic is illegal because it was developed under a unified control and at the expense of Nelson and, hence, should be given no consideration as evidence of consistency with the public interest. As seen, the evidence does not bear out a sacrifice on Nelson's part, perhaps because there are not very many origin-destination combinations common to the operating authorities of the two carriers with respect to Nelson's narrow range of commodities. To what extent, if any, Gilbertville's increase in traffic is attributable to the unified management, it is impossible to determine from this record. Moreover, if it be assumed that the increase is directly traceable to such management, neither the increase nor the operations conducted in handling the traffic involved can be said to be illegal.

Insofar as the record here reveals any facts upon the subject, it shows that neither the motor carrier nor railroad opponents will be adversely affected to any appreciable extent by the merged operations. Cf. *Kaplan Trucking Co. Purchase Hessler Cartage Co. (1956)*, 70 M.C.C. 1, 3. At any rate, all are well established in the areas involved and should be able to meet in the future as they have in the past the additional competition from Nelson under the unified rights.

Although applicants' witnesses indicated that if the operations of the two carriers had been unified during the first seven months of 1956, savings estimated at over \$37,000 would have been realized from various economies, since the witnesses were unable under cross-examination to substantiate the amounts to be saved as to some of the items, it is doubtful that the savings would reach that total. However, the evidence shows that a substantial amount

would be saved. This, together with the projected improvements in transportation services from the elimination of gateway observance on certain traffic presently interchanged, in loss and damage claim services, and in safety of operations and the establishment of a new terminal at Springfield are in the public interest and consistent therewith.

Murrie and Holmes, Adley, M & M, and Hemingway point out that the evidence fails to show any operations whatever over Gilbertville's general commodity regular routes between Boston and Lowell or to and from the intermediate and off-route points appurtenant thereto or over its irregular routes between points in Massachusetts; that the operating authority therefor is dormant and should be canceled since resumption of operations thereunder by Nelson would confront them with new competition contrary to the public interest. Holmes and Taylor's ~~claiming~~ general commodity rights in the latter to operate between New York City and Philadelphia, include Gilbertville's authority to haul sanitary napkins, facial tissues and paper boxes over regular routes from New York to Philadelphia with the above-mentioned authority to be canceled. The same criticism is made and the same disposition is requested with respect to the following irregular route authority contained in Gilbertville's certificate:

Pickled skins, from New York, N. Y., to Ipswich and Peabody, Mass.;

Pulphoard, from Boston, Mass., to Hardwick, Mass.;

Fertilizer and fertilizer materials, from Portland, Conn. to Hardwick, Mass., and points in Massachusetts within 15 miles of Hardwick;

Lime and Limestone products, from Adams and Lee, Mass., to Hamden, Hartford, and East Hartford, Conn., Providence and Woonsocket, R. I., New York,

N. Y., and points in New Jersey within ten miles of New York, N. Y.;

Agricultural commodities, from Hardwick, Mass., to Melrose, Conn., and New York, N. Y.

Applicants attached an exhibit to their application containing a list of some 3,500 shipments moved by Gilbertville in the months of March and May 1955, and also submitted in evidence an exhibit listing approximately 1,400 shipments moved by it in the period May 1-11, 1956, which lists, Kenneth Nelson testified, were fairly representative of all of Gilbertville's operations. An examination of the exhibits shows no shipments transported in regular route service under any of its regular route authority, and none of any of the specified commodities between any of the points named or described in the above-quoted portion of its certificate. It must, therefore, be concluded that the operating rights just referred to are dormant and should be canceled if the proposed transaction is consummated. Approval thereof will be conditioned accordingly. The two exhibits reveal service by Gilbertville within the State of Massachusetts between interchange points therein on the one hand, and, on the other, an unascertainable number, less than 40, of origin or destination points therein. It cannot, therefore, be concluded that the authority to operate between points in Massachusetts is dormant.

Employees would not be adversely affected by the transaction. The increase in Nelson's fixed charges would not be contrary to the public interest. The findings herein will be conditioned to require that Nelson shall write off immediately following the consummation the amount which would be assigned to its "Other Intangible Property" account as a result of the acquisition and merger. Following the usual practice in such cases, the amounts to be recorded on its books as a result of the transaction will not be approved at this time, but will be reserved for con-

consideration upon receipt of the statement to be filed as required by the order herein showing all expenditures and the accounting proposed to record the transaction.

In No. MC-F-6099, the Commission should find that the acquisition by the L. Nelson & Sons Transportation Co., of control of Gilbertville Trucking Co., Inc., through acquisition of its capital stock by exchange, the concurrent merger into the former of the operating rights and property of the latter for ownership, management, and operation, and the acquisition by Charles G. Chilberg and Clifford J. A. Nelson of control of the operating rights and property through the control and merger, upon the terms and conditions set forth, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5(2)(a) and will be consistent with the public interest and that, if the authority herein granted is exercised, The L. Nelson & Sons Transportation Co. will be entitled to operate under that portion of the operating rights in No. MC-87431 described in appendix A hereto, to be embraced in a certificate in its name, with duplications; if any, eliminated; provided, however, (1) that the portion of the operating rights in No. MC-87431 not described in appendix A shall be canceled concurrently with the exercise of the authority herein granted, and (2) that The L. Nelson & Sons Transportation Co. shall immediately write off the amount assigned to its "Other Intangible Property" account as a result of the transaction, such writeoff to be accomplished in the manner to be determined upon the submission of a statement showing all expenditures and accounting proposed to record the transaction, as required by our order herein.

In No. MC-F-6178, the Commission should find that The L. Nelson & Sons Transportation Co., Gilbertville Trucking Co., Inc., Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson and Kenneth A. H. Nelson effectuated or par

ticipated in effectuating the control and management of the L. Nelson & Sons Transportation Co. and Gilbertville Trucking Co., Inc., in the common interest of such carriers and of the individuals named above, and that all of them participated in the continuance of such control and management, in violation of section 5(4) of the act. In view of the conclusions in No. MC-F-6099, however, the investigation proceeding will be terminated by the order herein subject, however, to reopening for further proceedings in the event that the transaction in No. MC-F-6099 is not consummated and such control and management appears not to have been discontinued.

An appropriate order should be entered.

APPENDIX A

Operating authority authorized to be acquired and retained by The L. Nelson & Sons Transportation Co.

IRREGULAR ROUTES:

General commodities, except those of unusual value, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading,

Between points in Massachusetts,

Between the Town of Hardwick, Mass., on the one hand, and on the other, New York, N. Y., and points in New York and New Jersey within 20 miles of New York, N. Y.

Sanitary napkins, facial tissues, and machinery.

From Hardwick, Mass., to Boston, Mass., New York, N. Y., and points in New York and New Jersey within 20 miles of New York, N. Y.

Materials used or useful in the manufacture and sale of sanitary napkins and facial tissues.

From New York, N. Y., and points in New York

and New Jersey within 20 miles of New York, N. Y., to Hardwick, Mass.

Return with no transportation for compensation, except as otherwise authorized, to above-specified origin points.

General commodities, except those of unusual value, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading.

Between Palmer, Mass., and points in Massachusetts within ten miles of Palmer, on the one hand, and, on the other, points in Connecticut and Rhode Island;

Between Palmer and Monson, Mass., on the one hand, and, on the other, points in Massachusetts within five miles of Palmer and Monson.

Household goods as defined by the Commission.

Between Palmer, Mass., and points in Massachusetts within ten miles of Palmer, on the one hand, and, on the other, points in Vermont.

Household goods.

Between Hardwick, Mass., on the one hand, and, on the other, points in Connecticut, New Jersey, New York, and Rhode Island.

Livestock.

Between Palmer, Mass., and points in Massachusetts within ten miles of Palmer, on the one hand, and, on the other, points in Vermont.

APPENDIX B

Interstate Commerce Act 5(2), As

Amended, 63 Stat. 485 (1949):

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; . . .

(b) Whenever a transaction is proposed under subparagraph

(a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public

hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable. . . .

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; and (4) the interest of the carrier employees affected. . . .

Interstate Commerce Act 5(4), As

Amended, 54 Stat. 907 (1940):

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and para-

graph (5), the words "control or management" shall be construed to include the power to exercise control or management.

*Interstate Commerce Act § 5(5), As
Amended, 54 Stat. 907 (1940):*

(5) For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

*Interstate Commerce Act § 5(6), As
Amended, 54 Stat. 908 (1940):*

(6) For the purposes of this section a person shall be held to be affiliated with a carrier, if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any

other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

Interstate Commerce Act § 5(7), As

Amended, 54 Stat. 908 (1940):

(7) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this part; and with respect to any violation of paragraphs (2) to (12) inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to the part shall apply to such a violation by any other person.

Administrative Procedure Act § 7(c).

60 Stat. 241 (1946):

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence.

Administrative Procedure Act § 8(b).

60 Stat. 242 (1946):

... All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Administrative Procedure Act § 10(e).

60 Stat. 243 (1946)

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to a trial *de novo* by the reviewing court. In making the foregoing determinations the courts shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 542

GILBERTVILLE TRUCKING CO., INC., THE L. NELSON &
SONS TRANSPORTATION COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in Appendix A to this motion, *infra*, pp. 1a-5a.

STATEMENT

This is a direct appeal from a final judgment entered on July 18, 1961, by a three-judge district court dismissing appellants' complaint seeking to set

aside orders of the Interstate Commerce Commission issued under Section 5 of the Interstate Commerce Act, 49 U.S.C. 5.¹

Appellant L. Nelson & Sons Transportation Co. ("Nelson Co.") is a common carrier by motor vehicle, authorized by the Commission to transport specified commodities associated with the manufacture of cloth by irregular routes between certain points in New England and certain other points in New England, New York, New Jersey and Pennsylvania. Appellant Gilbertville Trucking Co., Inc. ("Gilbertville Co."), is a common carrier authorized to carry general commodities over regular and irregular routes within Massachusetts and over irregular routes between certain points in Massachusetts and certain points in New York, New Jersey, Connecticut and Rhode Island, and to carry specified commodities over some regular and some irregular routes between certain points in New England, New York, New Jersey and Delaware.

On October 6, 1955, by application filed in Docket No. MC-F-6099 under Section 5(2)(b) of the Interstate Commerce Act, 49 U.S.C. 5(2)(b), the two companies sought authority for Nelson Co. to acquire

¹ In their jurisdictional statement, appellants have printed the judgment and opinion of the court below (J. St. A-1 to A-23) and the proposed report of the Commission's hearing examiner (J. St. A-24 to A-81). They have cited the published Motor Carriers Cases for the report of the Commission's Division 4, decided on exceptions to the examiner's report, and the report of the full Commission, on reconsideration of the Division 4 report, which was the decision reviewed below. The latter two reports and the Commission's order of June 9, 1959, are set forth in Appendix B to this motion, *infra*, pp. 1b, 17b, 34b, and will be cited herein as "App." plus the page reference.

control of Gilbertville Co. through purchase of the latter's capital stock, and for the merger of Gilbertville Co. into Nelson Co. Appellants Clifford J. O. Nelson and Charles G. Chilberg, who jointly controlled Nelson Co. through stock ownership, joined in the application. Various rail and motor carriers intervened in opposition to this application.

By order of December 20, 1955, in Docket No. MC-F-6178, the Commission's Division 4 instituted an investigation under Section 5(7) of the Act, 49 U.S.C. 5(7), to determine whether control or management of Gilbertville Co. in a common interest with Nelson Co. may have been effectuated and may be continuing without Commission authorization, in violation of Section 5(4) of the Act, 49 U.S.C. 5(4). All of the appellants were named as respondents in the investigative proceeding (J. St. A-25).

After a consolidated hearing in the above dockets, the hearing examiner issued his proposed report on June 6, 1957 (J. St. A-24). On his review of the evidence concerning the transactions of and relations between the parties, the examiner found that "control and management in a substantial degree of Nelson and Gilbertville in the common interest of Nelson

² The positions held by the individual appellants at the time of the hearing were as follows: Charles G. Chilberg, president, treasurer and a director of Nelson Co.; Clifford J. O. Nelson, secretary, assistant treasurer and a director of Nelson Co.; Greta C. Carlson, vice-president and a director of Nelson Co.; and Kenneth A. H. Nelson, president, treasurer and beneficial owner of all stock of Gilbertville Co. All four are children of Mrs. Linnea Chilberg Nelson, deceased.

and its shareholders and of Gilbertville and its shareholders have been accomplished or effectuated and presumably are being maintained" in violation of Section 5(4) of the Act (J. St. A-69). He found further that the appellants had effectuated such common control "and that all of them participated in the continuance of such control and management in violation of Section 5(4) of the act" (J. St. A-80). Nevertheless on the ground that this and other violations appeared to result from "ignorance" or "a degree of carelessness" rather than "wilfulness," the examiner stated that "a finding of unfitness by reason of violations is not warranted" (J. St. A-72). He recommended, therefore, that the Commission grant the merger application in MC-F-6099, under certain conditions (J. St. A-79), and discontinue the investigation proceeding in MC-F-6178 (J. St. A-79-80).

Upon exceptions, the Commission's Division 4 issued its report and order on February 26, 1958 (App. 1b-16b; 75 M.C.C. 45). The division concurred in the examiner's conclusion that the appellants had violated Section 5(4) of the Act, noting that none of the parties had challenged the examiner's findings of unlawful control (App. 5b, 11b, 14b). However, contrary to the examiner's recommendation, the division found no excuse for these violations. It ruled that "[c]onsidering all the circumstances" including the long experience of the companies' principals in regulated carriage, the violation "should not be 'blessed' by approval." Division 4 denied the merger application and directed the termination of the unlawful common control (App. 15b-16b).

The two proceedings were thereafter reopened by the division for reconsideration, and then transferred to the full Commission (App. 19b). The entire Commission issued its report and order on reconsideration on June 9, 1959 (App. 17b-33b, 34b-35b; 80 M.C.C. 257). The Commission affirmed the findings of violation and found "that the control and management of The L. Nelson & Sons Transportation Co., in a common interest with Gilbertville Trucking Co., Inc., has been effectuated and is continuing in violation of Section 5(4) of the Interstate Commerce Act" (App. 29b-30b, 32b). In that connection, it found that Kenneth Nelson, who purchased the entire capital stock of Gilbertville Co. in 1953, was then "affiliated" with Nelson Co. within the meaning of that term in Section 5(6) of the Act (App. 29b); Section 5(5) provides that such acquisition by a person "affiliated" with another carrier "shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers" in violation of Section 5(4). The Commission also affirmed Division 4's determination that the merger should be denied and the parties directed to terminate the unlawful control and management in a common interest (App. 30b-32b). ~~Two~~ Commissioners dissented. The order entered on June 9, 1959, required appellants to terminate their violation and to divest themselves of stock in Gilbertville Co. within 60 days (App. 34b-35b).^{*}

^{*} This order of June 9, 1959 has not yet taken effect. Nelson Co. and Gilbertville Co. thereafter filed with the Commission a petition for reconsideration of its report and order, which was denied by order of February 15, 1960. Nelson Co. then

By its opinion and judgment of July 7, 1961, the district court dismissed the appellants' complaint and sustained the Commission's action (J. St. A-1 to A-23; 196 F. Supp. 351). The court (per Judge Wyzanski) held that the Commission's findings were "satisfactory not merely in form but in substance" and were supported by the record (J. St. A-17). It further held that the subsidiary findings established a violation of Section 5(4), the Commission's conclusion being "not merely reasonable but inevitable" (J. St. A-18-19). The court noted particularly that "purposeful dovetailing for a common set of ends" was shown by the convergence of "[m]any phases" of the business of Nelson and Gilbertville Cos., beginning with the purchase of Gilbertville Co. by Kenneth Nelson "at a moment when he is not shown to have severed a relationship to the arterial traffic nerve of" Nelson Co. (J. St. A-18-19). This determination did not "require resort to any legislatively enacted definitions or pre-

filed a petition seeking voluntary cancellation of its own outstanding operating authority, upon the condition that the Commission would vacate its orders of June 9, 1959, and February 15, 1960. On July 5, 1960, the Commission denied this Nelson Co. petition, and ordered the date for compliance to be effective 15 days thereafter. After the instant action was filed in the district court on August 5, 1960, the Commission postponed the effective date for compliance until its further order.

While the complaint below was directed in terms to the orders of the Commission on June 9, 1959, February 15 and July 5, 1960 (see J. St. A-9, A-23), the substantive issues are all presented by the order of June 9, 1959, set forth at App. 34b-35b.

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sumptions," although it was confirmed by such provisions in the Interstate Commerce Act (J. St. A-19-20).

Finally the court held that the Commission properly exercised its discretion to choose an appropriate remedy for violation of Section 5(4). The order of divestiture had a "fitness so perfect" to the offense, and the Commission's refusal of "lawful unification" to "a relationship already in part achieved by unlawful conduct is a clearly proper exercise of a delegated discretionary authority" (J. St. A-22-23).

ARGUMENT

This case presents no issue warranting plenary consideration by this Court. The only issues are: (1) whether the Commission correctly found a violation of the Interstate Commerce Act, in that Nelson Co. and Gilbertville Co. were put under common control without Commission authorization; and (2) whether this violation was a proper ground for denying an application for merger of the companies and for directing divestiture of stock interests in Gilbertville Co. by the other appellants. These two questions were properly answered in the affirmative by the district court. The Commission's subsidiary factual findings have never been contested by appellants, and there is no inconsistency in legal theory between the Commission and district court.

1. As the court below stated, this case has throughout presented "one dominant issue of fact * * * the issue of common control" (J. St. A-18). On this point, the record has been canvassed by the hearing examiner, the Commission's Division 4, the full Commission, and the district court. All have agreed that Nelson and Gilbertville Cos. were controlled or managed in a common interest, without Commission approval, in violation of Section 5(4) of the Act. In the circumstances, there is no occasion for this Court to undertake a plenary review of the facts.

The ultimate finding of unlawful common control rests securely on numerous subsidiary findings, nearly all of which were first set forth in the examiner's proposed report and, as the Commission and Division 4 noted, have never been challenged by the appellants (App. 5b, 11b, 26b). These findings include the joint use by Nelson and Gilbertville Cos. of terminals and telephone numbers; various arrangements by which the companies drew freely on each other's vehicles and drivers; the pooling and commingling of shipments to suit their convenience; arbitrary division of revenues from interline carriage according to a fixed formula, instead of the usual trade practice of computing the actual length of the companies' respective hauls; the "extremely liberal" handling of inter-company debit balances; and various activities engaged in by officials and employees of each company for the benefit of the other. See the statements of the examiner, J. St. A-38-46, 69; Division 4, App. 11b-14b; Commission,

App. 26b-30b; district court, J. St. A-10-16, 18-19. As the district court found, the convergence of the business of the two companies commenced with the purchase by Kenneth Nelson of Gilbertville Co. in March 1953 (J. St. A-18-19).

Appellants misconstrue the opinions below when they argue that the district court sustained the Commission's order on grounds entirely different than those relied upon by the Commission (J. St. 11, 20-21). Thus, appellants argue that the Commission found facts showing the type of unlawful common control prohibited by Sections 5(5) and 5(6) whereas the district court found that the facts showed an unlawful common control of different description prohibited by Section 5(4). But appellants overlook the fact that both court and Commission found unlawful common control in violation of Section 5(4). Moreover, they disregard the legislative history which shows that Section 5(4) declares unlawful all types of common control of which the situations set forth in Sections 5(5) and 5(6) are but specific examples.

The Commission found that Kenneth Nelson was "affiliated" with Nelson Co. when he purchased Gilbertville Co. and that the statutory presumption of Section 5(5) applied—the acquisition of one carrier by a person "affiliated" with another is "deemed to accomplish or effectuate" unlawful common control. But the Commission also specifically "affirm[ed] the findings" of Division 4 and the examiner,

both of which had found unlawful common control in violation of Section 5(4) without utilizing the presumption (App. 29b-30b). The district court held that the statutory presumption, resting on Kenneth Nelson's affiliation with Nelson Co. in 1953, "confirmed" the independent finding of unlawful control based upon the activities of and relations between the two carriers since that time (J. St. A-19). Moreover, contrary to appellants' contention (J.S. 23-27), the record clearly supports the conclusions of the court and the Commission that Kenneth Nelson was "affiliated" with Nelson Co. when he purchased Gilbertville Co. on March 2, 1953.

* Section 5(6) provides that a person is "affiliated" with a carrier if, because of his relationship, "the method of, or circumstances surrounding organization or operation" and other factors, "it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier."

In 1951, Kenneth Nelson resigned from Nelson Co. and sold his stock interest. However, he continued to maintain an office on Nelson Co. premises, allegedly as a "free lance" tariff consultant, but having only one client, Nelson Co., from which he received substantial sums in 1952 and 1953 (J. St. A-11-13, 63-65, App. 12b, 27b). The Commission's opinion states that Kenneth Nelson's consultant services ended on March 1, 1953, one day before he purchased Gilbertville (App. 27b). Nevertheless, the transaction was developed earlier (J. St. A-64). The circumstances at that time support, and the subsequent developments confirm, the reasonableness of the conclusion that Gilbertville would be (Section 5(6)) "managed in the interest of" Nelson Co., and hence that Kenneth Nelson and Nelson Co. were affiliated.

The district court, on examination of the record, found additional proof of "affiliation" in the evidence found by Division 4 (App. 12b) that Kenneth Nelson's employment by Nelson Co. actually continued past the date on which Gilbertville was

The legislative history cited by appellants is contrary to their contention that the presumptions in Section 5(5) and the definition of affiliation in Section 5(6) describe situations "not otherwise comprehended by" the prohibition of unlawful common control in Section 5(4) (J. St. 20). The Senate Report states that Section 5(5) and 5(6) were "designed to spell out and make clear the various possible forms of indirect control * * * which paragraph [5(4)] is intended to prohibit." S. Rep. 87, 73d Cong., 1st Sess., p. 9. In other words, Congress was putting its own gloss on the prohibition of unlawful common control in Section 5(4) in order to prevent evasion through the use of intermediates. The report continues (pp. 9-10):

These paragraphs have been planned in the light of what has already been done through myriad devices without commission supervision and in defiance of the will of Congress. They are necessary because of the difficulty in establishing as a matter of law, in many cases where as a matter of fact it is known, that control or management in a common interest of two or more carriers is effectuated or actually exists.

purchased (J. St. 11). Like other immaterial variations between the district court's factual statement and the administrative findings, this difference does not detract from the common findings that appellants had violated the Act.

*As originally enacted as part of the Emergency Railroad Transportation Act of 1933, and as cited in the above report, the present Sections 5(4), 5(5) and 5(6) were numbered 5(6), 5(7), and 5(8). 48 Stat. 218. The paragraphs were renumbered to their present arrangement in the Transportation Act of 1940, 54 Stat. 907, 907-908.

The provisions of paragraph [(4)] would be of little effect unless the language contained therein were construed to include control or management effectuated or exercised indirectly through the use of legal devices such as holding companies, voting trusts, and combinations of affiliated interests. It is therefore intended by the provisions of paragraph [(5)], [(6)] * * * to make sure that paragraph [(4)] covers such types of control and management.

See, also, Hearings on H.R. 9059 Before House Committee on Interstate and Foreign Commerce, 72d Cong., 1st Sess. (1932), pp. 32-34; *Greyhound Corp.—Investigation of Control—Southern Ltd.*, 45 M.C.C. 59, 77-78.

2. Having found appellants in violation of Section 5(4), the Commission has explicit authority "to require [them] to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation." Section 5(7), 49 U.S.C. 5(7). This broad discretion clearly sustains the Commission's requirement of divestiture by the other appellants of their interests in Gilbertville Co.

The standard for review of administrative remedies may aptly be taken from cases dealing with the Federal Trade Commission, another agency having "wide discretion in its choice of a remedy deemed adequate to cope with * * * unlawful practices." The rule is "The courts will not interfere except where the remedy selected has no reasonable relation to the unlaw-

ful practices found to exist." *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473; *Federal Trade Commission v. Mandel Bros.*, 359 U.S. 385, 392-393.

The unlawful practice here was the unauthorized acquisition of common control in two carriers, see *infra*, pp. 14-15. Nelson Co. was the original trucking business of the individual appellants, and the violation occurred when Gilbertville Co. was acquired by one of those "affiliated" with Nelson Co., and was operated "in a common interest" with Nelson Co. Appellants suggest an alternative remedy of separating Gilbertville's principal, appellant Kenneth Nelson, from Nelson Co. (J. St. 33). In view of the close relations between the appellants, and their illegal common activities heretofore, such a requirement would be ineffective to cure the violations found.

The district court properly relied on (J. St. A-22) *United States v. du Pont & Co.*, 366 U.S. 316. In that case, the Court noted that under the antitrust laws where the "heart" of a violation is "intercorporate combination and control," "[d]ivestiture or dissolution has traditionally been the remedy." 366 U.S. at 329. Analogously, in this case, as the court below ruled, "divestiture has a fitness so perfect that the order not merely is obviously a suitable exercise of discretion, but needs no gloss." (J. St. A-22).⁶

⁶ Petitioners' argument that "section 5(7) only authorizes the Commission to prevent further continuance of a continuing violation; it does not permit the Commission to punish,

3. Finally, the appellants' violation of Section 5(4) was a proper ground for denying the application to merge the two companies, Nelson and Gilbertville.

The evident purpose and effect of such violation is to achieve *de facto* merger without any governmental supervision and then, as the Commission put it, "to present a *fait accompli* for our approval." App. 31b: *Central Ry. of Georgia Control*, 307 I.C.C. 39, 43. The Commission pointed out that the Act requires it to pass upon "proposed" mergers or acquisitions of control, *i.e.*, "prior to consummation" and "including the justness and reasonableness of the terms upon which such control is to be acquired." If illegal premature acquisitions had to be countenanced, the Commission's "administration of the statute in the public interest

redress, or otherwise remedy a violation which is *fait accompli*" (J. St. 28), falls of its own weight. It is beyond dispute that in finding the *fait accompli* of unlawful common control, the Commission necessarily found a continuing violation of Section 5(4) which makes it "unlawful to continue to maintain [such] control or management * * *." This was all that was necessary to the exercise of the remedial powers conferred by Section 5(7). Further, despite appellants' contention to the contrary (J. St. 27-30), the Commission expressly found that the violation was presently "continuing" (App. 11b, 30b, 32b). This determination was supported by the subsidiary findings concerning the continuing character of the interrelationships and business practices of the two companies. *Supra*, pp. 8-9.

Divestiture has been the frequent remedy for violations of Section 5(4). *E.g.*, *Houff—Control—Elliott Bros. Trucking Co.*, 80 M.C.C. 637; *Sellers—Control—Huckabee Transport Corp.*, 80 M.C.C. 429; *Black—Investigation of Control*, 75 M.C.C. 275.

would be seriously hindered, if not defeated." *Ibid.*

The threat is well illustrated in the instant case. The hearing examiner found that appellants had violated Section 5(4), but recommended that the merger should be approved, in part on the ground that adverse competitive effects of the merger were "either already an accomplished fact or capable of becoming so even though the present application is denied" (J. St. A-74). But this avoidance of the Commission's control over mergers by premature common control is precisely the evil against which Section 5(4) is aimed.

In passing upon merger applications, the Commission is authorized to consider all factors pertinent to a decision whether "the proposed transaction * * * will be consistent with the public interest" (Section 5(2)). Appellants concede that the Commission is not limited to the four specific considerations listed in that section (J. St. 37); this Court so held in *Schwabacher v. United States*, 334 U.S. 182, 193. In exercising its expert judgment of what the "public interest" requires under Section 5(2) (cf. *McLean Trucking Co. v. United States*, 321 U.S. 67, 88-89), the Commission could surely decide that violations of the prohibition against unauthorized merger in another paragraph of the same section "should not be rewarded" (App. 31b-32b). In the circumstances here, such violation warranted denial of the appellants' application for subsequent approval of "a relationship

already in part achieved by unlawful conduct" (J. St. A-23).⁷

⁷ As Division 4 and the Commission noted (App. 15b, 30b-32b), the Commission now takes a more strict view of violations of Section 5(4) than in years past. The present rule was not, however, "created by the Commission in the present case" as appellants contend (J. St. 32), but was expounded in *Central Ry. of Georgia Control*, 307 I.C.C. 39, and applied in a number of other merger denials in recent years (*e.g.*, cases cited in footnote 6; *Powell—Purchase—Rampy*, 57 M.C.C. 597). In any event, the reasonableness of the decision would not be impaired even if it represented a new turn of policy. *Federal Communications Commission v. WOKO*, 329 U.S. 223, 227-229.

CONCLUSION

The issues in this case were correctly decided by the district court and by the Commission. There is no substantial question warranting plenary consideration by this Court. The judgment of the district court should be affirmed.

Respectfully submitted.

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JANUARY 1962.

APPENDIX A

Section 5 of the Interstate Commerce Act, 49 U.S.C. 5, provides in pertinent part:

* * * * *

(2) Unifications, mergers, and acquisitions of control,

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *

* * * * *

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the

Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier and employees affected.

(4) Control effected by other than prescribed methods.

It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words "control or management" shall be construed to include the power to exercise control or management.

(5) Transactions deemed to effectuate control or management.

For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

(6) Affiliation with a carrier defined.

For the purpose of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

(7) Investigation by Commission of effectuation of control by nonprescribed methods.

The Commission is authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4) of this section. If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2)-(12) of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person.

* * * * *

APPENDIX B

MF-2322

INTERSTATE COMMERCE COMMISSION

No. MC-F-6099¹

THE L. NELSON & SONS TRANSPORTATION CO.—CONTROL AND MERGER—GILBERT- VILLE TRUCKING CO., INC.

Decided February 26, 1958

1. In No. MC-F-6099, application of The L. Nelson & Sons Transportation Co., for authority to acquire control of Gilbertville Trucking Co., Inc., through purchase of capital stock, for merger into the former of the operating rights and property of the latter for ownership, management, and operation, and for the acquisition by Clifford J. O. Nelson and Charles G. Chilberg of control of the operating rights and property through the control and merger, denied.
2. In No. MC-F-6178, upon investigation, the control and management of The L. Nelson & Sons Transportation Co., in a common interest with Gilbertville Trucking Co., Inc., found to have been effectuated and to be continuing in violation of section 5(4), Interstate Commerce Act. Order entered directing termination of such violation.

Mary E. Kelley for applicants and respondents.

Francis E. Barrett, Francis E. Barrett, Jr., Robert G. Bleakney, Jr., Hugh M. Joseloff, William Q. Keenan, James G. Lane, T. W. Murrett, Arthur J. Piken,

¹ This report embraces No. MC-F-6178, The L. Nelson & Sons Transportation Co.—Investigation of Control—Gilbertville Trucking Co., Inc.

and *Kenneth B. Williams* for protestants in No. MC-F-6099 and interested parties in No. MC-F-6178.

Ellis V. Gregory, Nell Guinn, and Herman F. Mueller for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS WINCHELL, MINOR, AND
WALRATH

BY DIVISION 4:

Exceptions were filed by applicants, the Bureau of Inquiry and Compliance, hereinafter called the Bureau, and certain rail and motor protestants to the examiner's proposed report in No. MC-F-6099, and applicants and the protestants replied to each other. Applicants' exceptions contain a petition requesting a waiver of rule 1.86 of the General Rules of Practice for the reasons hereinafter stated. Our conclusions in No. MC-F-6099 differ from those of the examiner.

The L. Nelson & Sons Transportation Co., of Ellington, Conn., and Gilbertville Trucking Co., Inc., of Gilbertville, Mass., hereinafter called Nelson and Gilbertville, respectively, by joint application filed October 6, 1955, in No. MC-F-6099, seek authority under section 5 of the Interstate Commerce Act for (1) the acquisition by Nelson of control of Gilbertville through purchase of its capital stock, and (2) merger of the operating rights and property of the latter into the former for ownership, management, and operations. In the same application, Clifford J. O. Nelson, of Dover, Mass., and his half brother, Charles G. Chilberg, of Rockville, Conn., who control Nelson through equal ownership of 91.5 percent of its outstanding capital stock, seek author-

ity under the same section to acquire concurrent control of Gilbertville's operating rights and property through the transaction. Nelson and Gilbertville operate more than 20 motor vehicles.

In No. MC-F-6178, the Commission, division 4, on its own motion, by order entered December 20, 1955, instituted an investigation under section 5 (7) of the Interstate Commerce Act to determine whether control or management of Gilbertville in a common interest with Nelson may have been effectuated and may be continuing in violation of section 5 (4) of the act. Gilbertville, Nelson, Clifford J. O. Nelson, Charles G. Chilberg, Greta C. Carlson, a sister, and Kenneth A. H. Nelson, a brother, were made respondents.

A hearing of the two proceedings on a consolidated record has been held, at which 13 motor common carriers² and rail carriers in eastern territory opposed the application and appeared as interested parties in the investigation. The applicants-respondents, the motor-carrier protestants, and the Bureau introduced evidence. Briefs were filed by the applicants-respondents, the Bureau, and by all but the last six named motor-carrier protestants. No exceptions are taken by the parties to the factual statements in the examiner's report, and they are adopted as our own without being restated, except to the extent necessary for clarity.

² The Adley Express Company, Alvin R. Holmes, doing business as Holmes Transportation Service and/or Jones Express, Hemingway Bros. Trucking Co., M&M Transportation Company, Newburgh Transfer, Inc., F. B. Mutrie Motor Transportation, Inc., Taylor's Express Co., Jackson Transportation Corp., Lombard Bros., Inc., National Transportation Co., Downing and Perkins, Inc., H. T. Smith Express Co., and Westchester Motor Lines, Inc.

Nelson and Gilbertville are motor common carriers. The former holds irregular-route rights to transport principally materials used in the manufacture of cloth, waste materials resulting therefrom, and supplies and materials used in connection therewith, between specified points in Massachusetts and specified points in New Hampshire and Rhode Island, and between certain Rhode Island and Connecticut points and an area comprising approximately the eastern two-thirds of Massachusetts, on the one hand, and, on the other, New York, N.Y., certain New Jersey points, and Philadelphia, Pa. Gilbertville holds rights to transport general commodities (1) over numerous combinations of regular routes between Lowell and Boston, Mass., and (2) over irregular routes principally (a) between points in Massachusetts, (b) between the town of Hardwick, Mass., on the one hand, and, on the other hand, New York City and points in New York and New Jersey within 20 miles thereof, and (c) between Palmer, Mass., and points within 10 miles thereof, on the one hand, and, on the other, points in Connecticut and Rhode Island. It may also transport certain specified commodities. Since about March 1953, all of Gilbertville's outstanding stock has been owned by Kenneth Nelson, or persons closely identified with him or with Nelson.

Under the transaction in No. MC-F-6099, Nelson would acquire all of Gilbertville's outstanding stock, exchanging therefor shares of its own stock having an aggregate net book value equal to the aggregate net book value of Gilbertville's stock as of the date of consummation. Nelson would then take over all the assets and assume all the liabilities of Gilbertville and surrender its charter for cancellation. Had the transaction been effected July 31, 1956, Kenneth Nel-

son would have received 78 shares of Nelson's stock in the exchange.

Although finding that the respondents had effectuated and were continuing the control or management of Gilbertville in a common interest with Nelson in violation of section 5(4), the examiner further found that the proposed stock acquisition by Nelson, to be followed by the merger, would be consistent with the public interest, provided that the usual condition respecting amortization were imposed, and provided that the cancellation of certain unexercised authority of Gilbertville coincidentally with consummation were required. As to the unlawful common control, he expressed the view that the facts developed of record placed that question on the "borderline" but that, notwithstanding no single act, practice, or arrangement between the applicants-respondents established such unlawful control, the cumulative effect of the closely related factors, and the circumstances surrounding them, require such a finding. He concluded, however, that the evidence did not establish that the violations shown and the circumstances under which they occurred were the result of a persistent disregard for regulation, but stemmed from ignorance and carelessness, rather than from any willfulness on the part of the respondents. As to the proposed merger, he found that savings in transportation costs and improvements in service resulting therefrom were desirable in the public interest, and warranted approval of the transaction.

None of the parties challenges the examiner's findings of unlawful control, the applicants-respondents' only comment thereon in their exceptions being that they are perplexed by his findings in this regard. However, in order to preserve their rights as provided under rule 1.87 of the General Rules of Practice,

herein called the rules of practice, applicants-respondents, in their exceptions, renew their objections to rulings by the presiding examiner at the hearing which they describe as follows: (1) in directing that the hearing in No. MC-F-6099 go forward first, (2) in permitting the opposition under the guise of cross-examining applicants' witnesses therein to propound questions to bolster their position in the investigation proceeding, (3) in permitting certain testimony of a hearsay nature to be made a part of the record, (4) in prohibiting respondents' counsel from cross-examining certain witnesses respecting regulations of this Commission, and the law applicable to the matters alleged to have been unlawful, (5) in permitting an examination on and the introduction in evidence of a certain undated teletype message, and (6) in failing to accept certain financial data tendered. Under rule 1.74 of the rules of practice, the presiding officer has the option of determining whether on a consolidated record an application or investigation proceeding is to be heard first, and, in our opinion, his ruling here did not prejudice the parties. We have examined the facts pertinent to the other contentions and the examiner's rulings thereon and find that, except with respect to the teletype message, discussed later, the contentions of applicants-respondents are not justified.

In our opinion, the examiner should not have received in evidence as an exhibit copy of the teletype message, or authorized the taking of testimony in regard thereto, over the applicants-respondents objection. The message is undated, the sender and receiver and the location of the sending and receiving points are not identified, the message itself is incoherent and incomplete, and there is no evidence showing that the directives therein were actually put into

effect. We accordingly have disregarded the aforesaid exhibit and testimony relating thereto in the disposition of these proceedings.

Among Gilbertville's operating rights directed to be canceled by the examiner, should the merger be consummated, are those authorizing the transportation of sanitary napkins, facial tissues, and paper boxes, over a regular route between New York City and Wilmington, Del., over U.S. Highways 1 and 13, serving the intermediate point of Philadelphia and the off-route point of Rockland, Del. Applicants urge that these operating rights also be authorized to be retained by Nelson, contending that the Commission in granting these and similar rights (irregular-route general-commodity rights between the town of Hardwick and New York City) recognized that the shippers of such products were entitled to a complete service, and that Gilbertville has performed the service, several Wheelwright, Mass.-Philadelphia shipments having been shown to have moved by its line as far south as New York City and there interchanged, and one through shipment having been moved by it in the reverse direction from Rockland to Wheelwright. They do not object to the other cancellations proposed by the examiner. In their petition accompanying their exceptions, applicants request waiver of rule 1.86 of the rules of practice in order to incorporate as part of the record an accompanying list of shipments of napkins and tissue represented as having been handled by Gilbertville under the above rights at various times between June 15, 1956, and May 29, 1957, both inclusive. Protestants object to the introduction of this additional information at this late date, certain rail protestants contending that under the above rule arrangements for such supplementation of the record

should have been made before the close of the hearing. Rule 1.86 provides, in part, that, except as directed by the presiding officer at the hearing, or as expressly permitted in particular instances, the Commission will not receive in evidence or consider as part of the record any documents submitted for consideration after the close of the hearing. As pointed out by certain motor protestants, all the shipments in the list moved long after the instant application was filed, in fact only 10 moved before the close of the hearing. In view of the above, and protestants' objections to the receipt of the additional information at this late date, applicants' petition is denied. In view of our conclusions, it is unnecessary to consider further applicants' contention with respect to the regular-route special-commodity rights just described.

Protestants and the Bureau except to the examiner's findings that the section 5 application should be approved, contending that instead it should be denied because of the unfitness of the parties. They argue that he erred in finding that the violations do not establish a persistent disregard for regulation, but have been the result of ignorance and carelessness and not willfulness; in excusing the violations on the grounds of youth and inexperience; in concluding that a finding of unfitness by reason of the violations was not warranted; and, finally, in failing to recommend a divestiture in view of the findings that section 5(4) had been and is being violated. The protestant carriers also argue that the examiner erred in failing to find that the transaction as proposed would adversely affect existing carriers. As to the violations, protestants and the Bureau assert that, although young in years, the Nelson and Gilbertville officers are old in experience, and that to approve the control and merger would be tantamount to issuing an invitation

to carriers that all they have to do is consummate with the assurance that a liberal Commission will bless their *coup d'etat*. They urge that the examiner has failed to appreciate that a new pattern of operations built upon a prior unlawful assumption of control is entitled to no more consideration than dormant operations, and, as to his conclusion that the competition feared by protestants is either already an accomplished fact or capable of becoming so regardless of whether the transaction is approved, protestants maintain this would be a good argument and entitled to consideration if based on a legitimate competitive involvement, which is not the case here. They also state that another reason for denial is the difficulty of policing the unified operations, both from the standpoint of seeing that appropriate gateways are used and only lawfully authorized traffic is transported, which difficulties they urge outweigh any possible public benefits, indeed the present textile products handled direct by Nelson might be delayed by reason of their being commingled in the same equipment with Gilbertville's other authorized commodities which require routings through circuitous gateways.

In their reply, applicants-respondents assert that none of the exceptants questions Nelson's financial fitness, and that both it and Gilbertville have excellent safety records. They urge that the leasing by Gilbertville of certain of Nelson's equipment and terminal facilities, the part-time employment by each of the same drivers within the same pay period, the maintenance of duplicate medical certificates for drivers in the files of each carrier, the billing by Nelson of all shipments interlined with Gilbertville, and the finding of relatively few Gilbertville shipments moving with Nelson's shipments on the latter's trailers do not provide a sufficient basis for finding that the

applicants are unfit. They state that numerous carriers have been found to be fit, notwithstanding they lease equipment, use common terminals, and employ some of the same personnel, such as drivers and accountants; that some of the drivers here are also hired part time by other carriers, which, with the keeping of duplicate medical certificates, is generally a recognized practice in the industry; that there is no regulation prescribing which carrier actually must prepare the billing for shipments; and as to certain of Gilbertville's traffic alleged to have been commingled with Nelson's traffic, attention is called by the parties to the fact that one shipment involved an intrastate movement, and as to certain other traffic it is impossible to determine from the record whether such shipment was being actually used in the textile industry, but, if so, Nelson could have handled the shipment under its own rights. They contend that as to the one incident where a teletype message was destroyed, it is obvious that the Commission representative was convinced that the person guilty of the act was not then familiar with Commission regulations requiring their preservation, thus supporting the examiner's finding that the act of destruction was not willful. They argue that when considering the substantial volume of traffic handled by Nelson and Gilbertville, the many carriers with which each interlines, and the keen competition among the carriers in the New England area, it is inconceivable that any substantial deviation from this Commission's regulations would escape the attention of competitors and would remain unreported. They assert that it is significant here that not one protestant has offered evidence of its own concerning a violation. Respecting the resulting circuitous operations, applicants-respondents state that protestants have completely overlooked the fact that the slight

increase in operating expenses by operating circuitously (estimated by counsel to be approximately 28 miles longer via the Hardwick gateway than via the shortest route between Boston and New York City) would be more than offset by the increased revenues from operating loaded trailers instead of the partial loads of textile products now transported by Nelson. They state that the examiner recognized that an approval and consummation of the transaction as proposed under section 5 would terminate the practices which have been found objectionable, and that, should this Commission conclude to deny the application, there would be no necessity for the entry of a cease and desist order, as applicants-respondents have taken and will voluntarily take corrective action to eliminate the objectionable practices and conditions. Finally, they urge that protestants have taken no exceptions to the examiner's findings that no particular loss of traffic by protestants has been shown as a result of the applicants respondents operations, and that the economies and improvements in service resulting from the unification, as found by the examiner based on the evidence, clearly meet the requirements of the law and warrant his ultimate finding that the transaction would be consistent with the public interest.

As previously stated, no party of record excepts to the examiner's findings that the respondents have effectuated or participated in the effectuation of the control and management of Nelson in a common interest with Gilbertville in violation of section 5 (4), and that the violation is continuing. In view of our conclusions herein, it appears desirable to restate briefly certain of the salient facts providing the basis for that finding. The 4 individuals named as respondents are the children of Mrs. Linnea Nelson, deceased, and with 3 other children hold an equal number of shares

of stock in Bergson Company, a real estate holding company, hereinafter called Bergson. Respondent Kenneth Nelson's connection with Nelson as an officer, director, and stockholder was terminated in September 1951, when he sold his 50 shares of its stock to his brother, Clifford. An additional 42 shares of Nelson's stock which he had inherited from his mother were, pursuant to an agreement executed in September 1951, also transferred to Clifford immediately following a distribution of the estate in January 1953. Kenneth Nelson did not, however, entirely disassociate himself from Nelson in 1951 following the above stock sale. He continued to have an office at its Connecticut headquarters, and, during 1952, before his purchase of Gilbertville's stock, received a salary of \$15,650 from Nelson as its "free lance" tariff consultant. Such employment continued in 1953 even after he had acquired Gilbertville's stock on March 1, 1953, and resulted in the payment of a salary to him by Nelson aggregating \$13,829.

Bergson's properties include three terminals, one being Nelson's Connecticut headquarters and leased to it. Nelson in turn sublets space therein to Gilbertville. Another independently owned terminal located at New York City, is used by Nelson, Gilbertville, R. A. Byrnes, Incorporated, a motor carrier which is controlled through stock ownership by Clifford Nelson and Charles Chilberg, and by another carrier. Nelson and Gilbertville have the same telephone numbers at seven locations connected by leased interterminal lines, the total rental payments being initially borne by Nelson which is then partially reimbursed by Gilbertville.

Gilbertville regularly leases motor vehicles from Nelson, and at its own Gilbertville terminal, and the shared terminal in Connecticut maintains lists of

Nelson-owned equipment and prepared lease forms to facilitate the leasing of equipment. At the same point it has a complete file of doctors' certificates for all Nelson's drivers. On a number of occasions the same driver has been employed by both Nelson and Gilbertville during the same pay period. If Nelson or Gilbertville is handling a shipment destined to a point on the lines of the other, it has been the practice in the past for a vehicle to be leased to the destination carrier by the origin carrier and to use the same driver to move the equipment through.

Nelson and Gilbertville have given favorable consideration to each other concerning intercompany accounts, Gilbertville receiving such consideration respecting equipment rentals owed Nelson, and Nelson respecting interline settlements due Gilbertville. At least 25 percent of the repairs on Gilbertville's motor vehicles have been made in Nelson's shop at the Connecticut terminal, where it also has prepared all billing on the shipments interlined with Gilbertville, whether the shipment was prepaid or collect and irrespective of which carrier originated the shipment. Although Nelson and Gilbertville interline traffic with numerous other carriers as well as with each other, where they provide the service jointly the division of the revenue remains constant regardless of the length of the haul, whereas, customarily, such divisions between carriers are on a mileage pro rata basis.

Aside from the question as to whether the above constitutes unlawful common control, Gilbertville or Nelson has on various occasions violated the provisions of section 206 and certain regulations promulgated under part II of the act, including the performance of transportation service beyond the scope of their operating authorities, failure to observe proper gateways for traffic interchange, destruction of rec-

ords, and failure to have certain safety equipment on motor equipment, or failure to maintain such equipment in safe operating condition.

We concur in the examiner's conclusion that Nelson and Gilbertville are controlled or managed in a common interest in violation of section 5(4), our finding in this respect not being based on any single factor or several selected from the whole, but on the entire chain of circumstances revealed by the record. Having so found, the question for determination is whether we nevertheless should approve the transaction as proposed under section 5, the consummation of which would automatically terminate such violation for the future. Closely associated with the above, is the question as to whether, in view of the violation, Nelson would be a fit person to conduct the unified operations. We have on numerous prior occasions approved transactions involving partial or complete consummation where we have been able to find that such act, although unlawful, had not been deliberately effectuated and the transaction otherwise would be consistent with the public interest. Clearly, however, action adverse to the interest of the applicants can be taken, based on a finding of a violation of section 5(4). This was done recently in *Smithsons Holdings—Control—Ontario Frt. Lines Corp.*, 70 M.C.C. 623, decided August 13, 1957. Also, as the acquiring party applicant's fitness, financial and otherwise, is an issue in a section 5(2) proceeding, the authority sought may be withheld, if the circumstances warrant, based on other violations. See *Powell—Purchase—Rampy*, 57 M.C.C. 597. It should also be observed that the act clearly intends that our consideration be given to "proposed" transactions under section 5. *Congdon—Purchase—Wadkins*, 50 M.C.C. 781. By premature consum-

mation, viz, effecting, as here, the unlawful control and management in a common interest, we are impeded in the discharge of our statutory duty to consider the entire transaction in all its aspects. *Texas, New Mexico & Oklahoma Coaches, Inc.—Par.—Aaron*, 55 M.C.C. 269.

When regulation of motor-carrier transportation under the act was in its earlier stages, there were many instances when transactions under section 5 were approved, notwithstanding a showing of law violation, because the paramount public interest warranted approval. Now, after more than 20 years of regulatory experience, a more stringent approach is warranted, not as a penalty to these particular respondents, but in recognition that a violation of the law should not be rewarded, and that existing carriers endeavoring faithfully to comply with the law should be encouraged and protected. It should be emphasized that Nelson's and Gilbertville's principals are not new to transportation or to section 5 proceedings. Charles Chilberg has been associated with Nelson or its predecessor since 1930. He and his half brother Clifford Nelson have been parties in other section 5 proceedings. See *L. Nelson & Sons Transp. Co.—Purchase—White's Exp.*, 59 M.C.C. 675, and No. MC-F-5749, *Chilberg and Nelson—Control—R. A. Byrnes, Inc.*, 70 M.C.C.—(not printed in full), decided May 15, 1956. Kenneth Nelson, Gilbertville's principal stockholder, was associated with Nelson as long ago as 1948, and by the evidence herein has indicated that he is familiar with the obligations imposed on carriers under the act and prior decisions by the care with which he has been instructing Gilbertville's drivers in the use of specific gateway points when performing through opera-

tions under separately described portions of its authority. Considering all the circumstances, we are of the opinion that the violations of the law and of the regulations should not be "blessed" by approval in No. MC-F-6099, but rather, that respondents should be directed to terminate the unlawful control and management in a common interest. They will also be expected to cease the other violations. In view of our conclusions, it is unnecessary to consider other contentions of the parties.

We find, in No. MC-F-6099, that the transaction has not been shown to be consistent with the public interest, and that the application accordingly should be denied.

We further find, in No. MC-F-6178, that the control and management of The L. Nelson & Sons Transportation Co., in a common interest with Gilbertville Trucking Co., Inc., has been effectuated and is continuing in violation of section 5(4) of the Interstate Commerce Act, and that the respondents The L. Nelson & Sons Transportation Co., Gilbertville Trucking Co., Inc., Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson, and Kenneth A. H. Nelson, have participated in the effectuation of such control and management in a common interest, and that said respondents are participating in its continuance.

An appropriate order, which will deny the application and require the respondents named above to terminate the violation of section 5(4) of the act, will be entered.

COMMISSIONER WINCHELL dissents.

MF-2429

INTERSTATE COMMERCE COMMISSION

No. MC-F-6099¹

THE L. NELSON & SONS TRANSPORTATION CO.—CONTROL
AND MERGER—GILBERTVILLE TRUCKING CO., INC.

Decided June 9, 1959

Upon reconsideration:

1. In No. MC-F-6099, application of The L. Nelson & Sons Transportation Co., for authority to acquire control of Gilbertville Trucking Co., Inc., through purchase of capital stock, for merger into the former of the operating rights and property of the latter for ownership, management, and operation, and for the acquisition by Clifford J. O. Nelson and Charles G. Chilberg of control of the operating rights and property through the control and merger, denied.
2. In No. MC-F-6178, control and management of Gilbertville Trucking Co., Inc., in a common interest with The L. Nelson & Sons Transportation Co., found to have been effectuated and to be continuing in violation of section 5(4) of the Interstate Commerce Act. Order entered directing termination of such violation. Prior report, 75 M.C.C. 45.

Appearances as shown in the prior report.

¹ This report embraces No. MC-F-6178, The L. Nelson & Sons Transportation Co.—Investigation of Control—Gilbertville Trucking Co., Inc.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION :

In the prior report, 75 M.C.C. 45, decided February 26, 1958, by division 4, (1) in No. MC-F-6099, authority was withheld under section 5 of the Interstate Commerce Act for the acquisition by The L. Nelson & Sons Transportation Co., of Ellington, Conn., of control of Gilbertville Trucking Co., Inc., of Gilbertville, Mass., hereinafter called Nelson and Gilbertville, respectively, through purchase of capital stock, the concurrent merger of the operating rights and property of Gilbertville into Nelson for ownership, management, and operation, and for Clifford J. O. Nelson, of Dover, Mass., and Charles G. Chilberg, Rockville, Conn., who control Nelson through ownership by each of 45.8 percent of its outstanding capital stock, to acquire control of Gilbertville through the transaction, and (2) in No. MC-F-6178, it was found that the control and management of Nelson and Gilbertville in a common interest had been effected and was continuing in violation of section 5(4) of the act; that the respondents, Nelson, Gilbertville, Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson, and Kenneth A. H. Nelson had participated in accomplishing such control and management in a common interest and in its continuance; and that respondents should terminate the violation. An order was entered denying the application in No. MC-F-6099, ordering termination of the violation, and requiring certain respondents to report within 60 days the steps taken by each to comply.

By petition filed April 21, 1958, petitioners sought reconsideration of the report and order of February 26, 1958, or in the alternative, oral argument. Replies were filed by our Bureau of Inquiry and Compliance,

hereinafter called the Bureau, and joint replies were filed by (1) The Adley Express Company, M. & M. Transportation Company, and Hemingway Brothers Interstate Trucking Company, hereinafter called the Adley group, (2) P. B. Mutrie Motor Transportation, Inc., Alvin R. Holmes, doing business as Holmes Transportation Service and/or Jones Express, Newburgh Transfer, Inc., and Taylor's Express Co., hereinafter called the Mutrie group, and (3) Downing & Perkins, Inc., H. T. Smith Express Company, Lombard Bros., Inc., and National Transportation Company, hereinafter called the Downing group. A motion to strike portions of the petition of petitioners was filed by the Downing group, and a motion to strike the entire petition was filed by class I rail carriers in eastern territory, both on the basis that the petition contained redundant, immaterial, impertinent, or scandalous matter in violation of rule 14(d) of the Commission's Rules of Practice. The Downing group also alleged that the petition contained new material not properly for consideration at this time. Petitioners replied to the motions. Motions to strike portions of the replies of the Bureau and the Mutrie group were filed by petitioners, and the Bureau replied. By order of October 2, 1958, division 4 reopened the proceedings for reconsideration on the present record. We have recalled the proceedings from the division, for consideration and determination in this report. Contentions raised by the petitioners and protestants not detailed herein have been considered and are deemed without merit.

Petitioners argue that the motion of "Class I rail carriers" to strike their petition for reconsideration should be dismissed, as the complaining parties are not fully identified; that it is doubtful that all of the eastern railroads have agreed to the motion; and that

the rail-carrier protestants presented no evidence in the proceeding and their position is unknown. They also contend that the persons preparing the motion did not participate in the hearing and are unfamiliar with the matters involved. In our opinion, the arguments of petitioners are without merit. The rail-carrier association has participated in the proceedings from the beginning, and if petitioners desired more detailed information as to the specific membership of the association, they should not have waited until this late date. The contentions of the rail carriers adequately reflect their interest and position in the proceedings. The attorney preparing the motion, although different from the attorney participating at the hearing and the attorney preparing other pleadings in this proceeding, is a representative of the association or of a member thereof, and without evidence to the contrary, we must assume he was authorized to take the action he did. See *Illinois-Minnesota M. Car. Conference, Inc., v. E. L. Murphy*, 64 M.C.C. 242, and the cases cited therein.

With respect to the motion of the Downing group and of the rail carriers to strike specific portions of the petition of applicants for reconsideration, we agree that most of the matter specifically complained of is immaterial, irrelevant, scandalous, or impertinent, and as such is objectionable and properly excludable under the provisions of rule 1.4(d) of the Commission's Rules of Practice. *Keith Ry. Equipment Co. v. Assn. of American Railroads*, 274 I.C.C. 469, 471, and *Gums and Resins from the East to the Pacific Coast*, 291 I.C.C. 435, 437. The motion of the Downing group and of the rail carriers to strike specific portions of the applicants' petition for reconsideration, to the extent any of those portions have not

been considered elsewhere in this report, will be granted.

As to the motion of petitioners to strike certain portions of the reply of the Bureau, we agree that the portions of such reply wherein reference is made to "wandering dissertation" and "unintelligible discussion" should be stricken from the record, and in this respect the motion of petitioners will be granted. We do not consider the other matter complained of as objectionable or beyond the scope of the interest of the Bureau in these proceedings, and the motion of petitioners in all other respects, will be denied.

Petitioners also request that certain portions of the reply of the Mutrie group be stricken from the record, as not supported by the evidence or beyond the scope of their interest in these proceedings. Particularly they object to statements made relative to matters involved in the investigation proceeding or to the nature of the operations performed by Gilbertville, prior to March 1953, such as:

If the Interstate Commerce Act and the regulations of the Commission pursuant thereto are to be meaningful, the Commission must take a strong stand in withholding its approval where it is obvious as it is here that applicants seek approval *nunc pro tunc* of a transaction which already is a *fiat accompli*. [sic]

It seemed clear that Gilbertville's certificate could not have been transferred to Vendee in a Section 5 proceeding in March of 1953, or whatever time a member of the Nelson family actually acquired control, because the certificate was basically dormant at that time.

Petitioners assert that the said protestants presented no evidence in the investigation proceeding and that, as to the nature of the operations of Gilbertville prior to March 1953, they successfully prevented the

introduction of evidence at the hearing which would have established the continuity of such operations. It is true that the protestants presented no evidence in the investigation proceeding, and the question of the nature of the operations performed by Gilbertville prior to March 1953 is too remote to be controlling of our conclusions herein. However, the argument in the reply of protestants does not alter their basic position in the section 5 proceeding, and it is clear that their appearance and interest is in support of the Bureau in the investigation case. We do not consider any of the arguments in question as objectionable, requiring that it be stricken from the record. The motion of petitioners in this respect is overruled.

In their petition for reconsideration, petitioners argue that the division erred in finding that Nelson and Gilbertville had violated the provisions of section 206 and certain regulations of the Commission, in that it had conducted unlawful operations and failed to maintain safety equipment on vehicles or to keep vehicles in safe operating condition. They assert there is no evidence of record to sustain such conclusions; that these claimed violations, in any event, are not properly for consideration in these proceedings; and that the parties have been deprived of a full and complete hearing in violation of their constitutional rights. They further argue that the division erred in finding that Nelson and Gilbertville are controlled and managed in a common interest in violation of section 5(4), pointing out that the examiner, although reaching the same conclusion, had found the question to be a borderline case. They assert that the cases cited by the division to support its conclusions, particularly *Smithsons Holdings—Control—Ontario Frt. Lines Corp.*, 70 M.C.C. 623, and *Powell—Purchase—Rampy*, 57 M.C.C. 597, are

not in point, because no ulterior motive has been shown to exist as the basis for the purchase by Kenneth Nelson of the stock of Gilbertville, that he secured advice from other family members, or that the parties involved have been guilty of flagrant violations of the act and the regulations of the Commission. They contend that the fact that Gilbertville and Nelson shared the same facilities in Connecticut and the relationship of the parties was well known to the Commission prior to the filing of the section 5 application; that the division failed to give consideration to the efforts of both Nelson and Gilbertville to comply with all the rules and regulations of the Commission; and that the conclusion that the transaction in No. MC—F—6099 would not be consistent with the public interest is not supported by the weight and preponderance of the evidence.

Petitioners further argue that the division erred in finding that the protestant carriers who appeared in opposition to the section 5 transaction also appeared as interested parties in the investigation, contending, in this respect, that such protestants took no part or interest in the investigation proceeding, presented no evidence therein, and have not, in fact, alleged any violations of the act by either Nelson or Gilbertville. They allege that the division erred in substituting suspicion for facts in finding that, since March 1953, the stock of Gilbertville had been owned by Kenneth Nelson or those closely affiliated with him; in basing the unlawful common control conclusion on the activities of Kenneth Nelson prior to his purchase of the stock of Gilbertville, and on the division of interline revenues between Nelson and Gilbertville; and in reaching its conclusions without considering that the applicants-respondents had received no prior warning that any of their activities

were unlawful, thereby depriving them of an opportunity to correct any deficiencies. They contend that the division erred in relying on suspicion and innuendo to justify the conclusions that applicants-respondents had violated the provisions of section 206 of the act and the regulations of the Commission; in failing to find that the transaction would be in the public interest; and in failing properly to consider the evidence of record and the supplemental data submitted with their exceptions to the examiner's report to justify the retention of authority for the transportation of sanitary napkins, facial tissues, and paper boxes, between New York, N.Y., and Wilmington, Del. Applicants-respondents further allege that the division should not use double standards to deny this application, involving small carriers, on the grounds of unlawful control, while on the other hand, finding consistent with the public interest an acquisition by the St. Louis-San Francisco Railway Company of stock control of the Central of Georgia Railway Company, and discontinuing an investigation proceeding involving those carriers in Finance Docket No. 19159, *Central of Georgia Ry. Co. Control*, 295 I.C.C. 563 (embracing docket No. 31977, Central of Georgia Railway Company Investigation of Control), hereinafter called the *Central of Georgia case*.¹

¹ In a report on reconsideration in the *Central of Georgia case*, 307 I.C.C. 39, decided November 14, 1958, the Commission reversed the decision of July 9, 1957, by division 4, and denied the application of the St. Louis-San Francisco Railway Company for authority to acquire control of the Central of Georgia Railway Company through ownership of capital stock, and ordered that the St. Louis-San Francisco Railway Company terminate its power to control or manage the Central of Georgia Railway Company either through disposition of the stock to uninterested parties or the transfer thereof to a corporate

Lastly, they question the validity of the order of February 26, 1958, asserting that it demands that they cease violations of the act which are unknown, unlisted, and unspecified.

The Bureau and the protestant motor carriers, collectively and generally argue, in their replies, that the petitioners have failed to show wherein the division erred, and that its conclusions are adequately supported by the evidence of record and that its findings should be affirmed. They contend that the petitioners' allegations of error are not based upon facts but principally on false assumptions, unwarranted accusations, or incorrect, distorted, and unsupported arguments. The Bureau further contends that petitioners seek to misrepresent the true context of a stipulation between it and petitioners relative to the lawful observance by the carriers of an authorized gateway area; that the evidence, as detailed by the examiner in his report, clearly shows that the petitioning carriers have violated the act; that the parties cannot plead they were surprised by the investigation proceedings as they received adequate prior warning that the Commission questioned their relationship; that they were forewarned of the evidence to be presented by the Bureau in the investigation proceeding; that the act declares certain action to be unlawful per se and that whether the parties possessed ulterior motives is not controlling; that counsel for applicants-respondents would deprive the Commission of its right to receive evidence and make findings regarding fitness in a section 5 proceeding; that it is clear the application under section 5 was filed to legalize

trustee or trustees. The effective date of that order has been postponed to allow consideration of a petition for reconsideration.

an unlawful existing situation; that in the cases cited by applicants, wherein unlawful control existed and the applications were approved, mitigating circumstances existed, whereas none exist in the instant proceedings; that no public interest has been shown to justify approval of the section 5 application; and that a strong transportation system cannot be achieved by rewarding parties for their misconduct. Protestant motor carriers concur in the findings of the division and its rejection of data submitted by petitioners with their exceptions to the examiner's report purporting to show operations under Gilbertville's authority to transport sanitary napkins, facial tissues, and paper boxes. In our opinion, rejection of the data submitted by applicants-respondents with their exceptions was proper under rule 1.86 of the General Rules of Practice.

As stated in the prior report, none of the parties, including applicants-respondents, have disputed the factual statements of the examiner in his report, which were generally adopted in the prior report of the division. Petitioners, however, contend that such facts are not sufficient to justify the conclusion in the prior report that the control and management of Nelson and Gilbertville in a common interest had been accomplished and are continuing in violation of section 5. They contend that at most, a borderline case is presented as found by the examiner, and that, as a rule, the relationship of Gilbertville and Nelson, in their operations, as detailed in the prior report and the report of the examiner, are not unusual between motor carriers generally.

The evidence shows that Mrs. Linnea Nelson, with two of her seven children, Charles Chilberg and Oscar Chilberg, inaugurated the business of Nelson as a partnership in 1930. It was incorporated in

1947. As of May 14, 1948, of the 500 shares of authorized capital stock outstanding, 300 shares were held by Mrs. Nelson and 50 shares each by Charles, Oscar, Clifford, and Kenneth Nelson. Mrs. Nelson died in 1950 and her stock, less 6 shares which subsequently became treasury stock, was devised, 42 shares each, to her seven children. In June and September, 1951, and in January 1953, Oscar and Kenneth sold their stock (92 shares each) to Charles and Clifford, respectively, and resigned from the business. Since the latter date Charles and Clifford have held 226 shares each of the capital stock of Nelson. Kenneth and Oscar have been neither officers nor directors since 1951. However, from September 1, 1951, to March 1, 1953, Kenneth had an office at one of Nelson's terminals where as a "free lance" tariff consultant, he served only Nelson, and was paid by Nelson \$15,650 in 1952 and \$13,829 in 1953.

Under a contract of March 2, 1953, after consultation with his accountant and financial adviser, Kenneth agreed to purchase the capital stock of Gilbertville, consisting of 100 shares, for a net consideration of \$22,447, of which \$10,000 was evidenced by a promissory note signed by him and Oscar. A loan of \$30,000 was secured from a bank on a note signed by the same individuals to help finance the transaction and to furnish Gilbertville with working capital. Upon the transfer of that stock 51 shares were held by Kenneth, 48 by Oscar, and 1 share by Kenneth's attorney. In March 1954, Oscar transferred his shares to Kenneth who, in turn, transferred 24 shares each to his wife and to the manager of their terminal at Gilbertville, apparently in name only.

The Bergson Company, organized in January 1953, is a real estate holding company, whose 490 shares of stock are owned in equal amounts by the seven children, and they are its directors. Kenneth is not an officer of Bergson. Of the five terminals utilized by Nelson in its operations, four are leased from Bergson, including a terminal at Rockville-Ellington, Conn., which is also used as the headquarters of both Nelson and Gilbertville. The latter subleases terminal facilities from Nelson at Rockville-Ellington, Newton, Mass., and Woonsocket, R.I., owned by Bergson, and, at New York City, owned by other parties. At a garage and repair shop maintained at Rockville-Ellington, Nelson performs about 25 percent of the repair work on the equipment of Gilbertville.

At two of the terminals owned by Bergson, at the one in New York City, and at four other points, Nelson and Gilbertville have the same telephone numbers. The total cost of leased interterminal telephone lines is \$1,100 a month and Gilbertville pays Nelson \$400 a month as sublessee. Nelson occasionally leases equipment from Gilbertville, although the latter constantly and frequently leases from a pool of equipment maintained by Nelson. Both draw upon the same group of drivers, and information relative thereto, including medical certificates, is maintained in the files of both companies. To the extent that they interline, revenues are divided on a fixed percentage basis and Nelson does all of the billing for such traffic. Frequently the same driver will be employed by both companies during the same pay period, and on those occasions where a shipment moves from a point in the territory of one to a point in the territory of the other the same driver and vehicle will perform the through movement un-

der prearranged lease arrangements. The two companies use the same source for accounting and financial advice, each operates to some extent, at least, under managerial direction from officers of the other, and they are liberal with each other in the settlement of intercompany accounts. There has also been a commingling of traffic of the two carriers in the same vehicles whenever it suits their convenience.

As of March 1953, Gilbertville had one truck, three tractors, and four trailers, and had a deficit in surplus of \$39,868. As of December 31, 1953, however, it had a net worth of \$18,935. In 1953 Gilbertville's revenues were \$75,489, whereas for the first 7 months of 1956 they had increased to \$444,777. Its equipment increased substantially during that period. In 1953 the revenues of Nelson were \$895,774, and for the first 7 months of 1956 they were \$630,607. Under an authority granted by this Commission, Gilbertville, on June 16, 1954, acquired the operating rights of Louis Marner, doing business as Wolff's Express. In April or May of 1954, Charles Chilberg and Clifford Nelson negotiated for the capital stock of R. A. Byrnes, Incorporated, hereinafter called Byrnes, and upon approval of this Commission, the transaction was consummated August 21, 1956. The general-commodity authority of Byrnes complements that of Gilbertville, and by interchange a through service on general commodities can be provided between points in Massachusetts, Rhode Island, and Connecticut, on the one hand, and, on the other, points south thereof to the District of Columbia. Considering all the facts of record, we are of the opinion, and find, that Kenneth Nelson was affiliated with Nelson within the meaning of section 5(6) at the time he purchased the stock of Gilbertville, and that the conclusive presumption of section 5(5) applies; we affirm the find-

ings in the prior report, and in the report of the examiner, that the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing in violation of section 5(4) of the act.

It has been consistently found in many reports in proceedings under section 5, involving motor carriers, that a prior unlawful consummation of a transaction for which authority is sought, or the unlawful accomplishment of the control or management in a common interest of the carriers involved, is not an absolute bar to approval of the transaction. The law violation has been viewed as only one of the elements to be considered. A similar view has been expressed in determining applications for certificates under section 207 of the act, past violations of law by such applicants having been considered in appraising their fitness to hold the authority sought. Thus, some applications have been granted under section 5 in spite of the unlawful control, *Baggett—Control—Walker Hauling Co., Inc.*, 65 M.C.C. 522, *Masten Transp., Inc.—Merger*, 70 M.C.C. 421, and *Atlas Van Lines, Inc.—Control and Merger*, 70 M.C.C. 629 and 75 M.C.C. 175; and some have been denied, *Hughes—Control—M.P. & St. L. Exp., Inc.*, 70 M.C.C. 261, *Deaton Truck Line, Inc.—Pur.—Capitol Freight Lines, Inc.*, 70 M.C.C. 355, and *Woodworth—Purchase—Griffin*, 70 M.C.C. 520. In a recent report on reconsideration, in Finance Docket No. 19159, *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39, where we found that the control of the Central of Georgia Railway Company had been acquired by the St. Louis-San Francisco Railway Company in violation of section 5(4), we stated, at page 43:

We agree with division 4 that such violation is not necessarily a bar to approval of an application under section 5(2), if, upon consideration of all the facts, it clearly appears that the public interest will be served best by such approval. In our opinion, such is not the case here. The public interest is concerned not only with improvements in transportation service, but also with the maintenance of respect for and the observance of the law. If Frisco is permitted to retain the fruits of its unlawful conduct, and we sanction such conduct, which we consider to have been in flagrant disregard of the law, others will be encouraged to pursue a like course and to present a *fait accompli* for our approval. Obviously, such is not in accord with the intent of the statute, i.e., that we pass upon "proposed" acquisitions of control prior to their consummation, including the justness and reasonableness of the terms upon which such control is to be acquired. If the indicated practice were generally followed, our administration of the statute in the public interest would be seriously hindered, if not defeated.

We reaffirmed, in the foregoing, the view heretofore followed, that law violations are not necessarily a bar to approval of an application, if the public interest will best be served by approval of the transaction presented. In this respect, in the prior report of division 4, it was stated, at page 54:

When regulation of motor-carrier transportation under the act was in its earlier stages, there were many instances when transactions under section 5 were approved, notwithstanding a showing of law violation, because the paramount public interest warranted approval. Now, after more than 20 years of regulatory experience, a more stringent approach is warranted, not as a penalty to these particular

respondents, but in recognition that a violation of the law should not be rewarded, and that existing carriers endeavoring faithfully to comply with the law should be encouraged and protected. It should be emphasized that Nelson's and Gilbertville's principals are not new to transportation or to section 5 proceedings.

* * * Considering all the circumstances, we are of the opinion that the violations of the law and of the regulations should not be "blessed" by approval * * * but rather, that respondents should be directed to terminate the unlawful control and management in a common interest.

We have carefully considered the evidence and the pleadings and find no error in the findings and conclusions in the prior report, or other basis upon which to arrive at a conclusion different than that reached in the *Central of Georgia* case, *supra*, or to support a finding that the transaction for which authority is sought would be consistent with the public interest under all the circumstances.

We find, in No. MC-F-6099, that the transaction has not been shown to be consistent with the public interest, and that the application accordingly should be denied.

We further find, in No. MC-F-6178, that the control and management of The L. Nelson & Sons Transportation Co., in a common interest with Gilbertville Trucking Co., Inc., has been effectuated and is continuing in violation of section 5(4) of the Interstate Commerce Act, and that the respondents The L. Nelson & Sons Transportation Co., Gilbertville Trucking Co., Inc., Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson, and Kenneth A. H. Nelson participated in the effectuation of such control and management in a common interest and in its continuance.

An appropriate order, which will deny the application and require the respondents named above to terminate the violation of section 5(4) of the act, will be entered.

COMMISSIONER FREAS, concurring in the result:

I agree with the findings of the report that the control and management of Nelson in a common interest with Gilbertville has been effectuated in violation of section 5(4) of the act, that the transaction has not been shown to be consistent with the public interest, and that the application should, therefore, be denied. The latter conclusion is warranted, in my opinion, not so much because of any evidenced disregard of the law, but principally because of a lack of a clear showing that there is a paramount overriding public interest which would best be served by a grant of the approval sought.

COMMISSIONER HUTCHINSON, dissenting:

On the record as a whole I would find the transaction to be consistent with the public interest and affirm the findings in the report of the hearing examiner.

COMMISSIONER MCPHERSON, dissenting:

For the reasons set forth in the dissenting expression in *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39, I would approve the application for control in No. MC-F-6099, and discontinue the investigation in No. MC-F-6178.

COMMISSIONER GOFF dissents.

COMMISSIONERS MITCHELL, ARPAIA, and WINCHELL did not participate.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 9th day of June, A.D. 1959.

No. MC-F-6099

THE L. NELSON & SONS TRANSPORTATION CO.—CONTROL AND MERGER—GILBERTVILLE TRUCKING CO., INC.

No. MC-F-6178

THE L. NELSON & SONS TRANSPORTATION CO.—INVESTIGATION OF CONTROL—GILBERTVILLE TRUCKING CO., INC.

Further investigation of the matters and things involved in these proceedings having been made, and the Commission, on the date hereof, having made and filed its report on reconsideration, which report, and the prior report of Division 4, dated February 26, 1958, are made a part hereof:

It is ordered, That the application in No. MC-F-6099 be, and it is hereby, denied.

It is further ordered, That, in No. MC-F-6178, respondents The L. Nelson & Sons Transportation Co., and Gilbertville Trucking Co., Inc., both corporations, and Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson, and Kenneth A. H. Nelson, individuals, and each of them, be, and they are hereby, required to terminate the violation of the provisions of section 5(4) of the Interstate Commerce Act, found in the said report to have been accomplished and to be continuing through the control or management of The L. Nelson & Sons Transportation Co. of Ellington, Conn., in a common interest with Gilbertville Trucking Co., Inc., of Gilbertville, Mass.

It is further ordered, That the said respondents be, and they are hereby, required to divest themselves of any and all interest which they may have in the capital stock of Gilbertville Trucking Co., Inc., *provided, however,* that in such divestment, none of the shares of stock shall be sold or transferred directly or indirectly to any stockholder, officer, director, employee, or agent of, or anyone otherwise directly or indirectly affiliated with or connected with or under the control or influence of The Nelson & Sons Transportation Co., or to any corporation in which it is financially interested or with which it is affiliated, or to any stockholder, officer, director, or employee of any such corporation, or its subsidiary or affiliated companies.

And it is further ordered, That The L. Nelson & Sons Transportation Co., and Gilbertville Trucking Co., Inc., both corporations, and Charles G. Chikberg, Clifford J. O. Nelson, Greta C. Carlson, and Kenneth A. H. Nelson, individuals, shall report to this Commission, within 60 days from the date hereof, the steps taken by each of them to comply with the requirements of this order with respect to termination of the said violation of section 5(4) of the act.

By the Commission.

(SEAL)

HAROLD D. MCCOY, *Secretary.*

FEB 9 1962

JOHN F.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. 40

GILBERTVILLE TRUCKING CO., INC.,
THE L. NELSON & SONS TRANSPORTATION
COMPANY, CHARLES G. CHILBERG, CLIFFORD
J. O. NELSON, GRETÀ C. CARLSON, and
KENNETH A. H. NELSON,

APPELLANTS,

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

APPELLEES

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS**

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1961

No. 542

GILBERTVILLE TRUCKING CO., INC.,
THE L. NELSON & SONS TRANSPORTATION
COMPANY, CHARLES G. GIELBERG, CLIFFORD
J. O. NELSON, GRETA C. CARLSON, and
KENNETH A. H. NELSON,

APPELLANTS,

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

APPELLEES

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS**

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

This is a direct appeal from a final judgment of a three judge United States District Court for the District of Massachusetts which dismissed appellants' suit to enjoin and set aside certain orders of the Interstate Commerce

Commission. The challenged decision of the Commission held that appellants had violated the prohibition of sections 5(4), 5(5) and 5(6) of the Interstate Commerce Act,¹ denied an application for approval pursuant to section 5(2) of the Act (49 U.S.C. § 5(2)) of a proposed merger of appellants Gilbertville Trucking Co., Inc. ("Gilbertville Co.") and The L. Nelson & Sons Transportation Company ("Nelson Co."), and directed divestiture of the stock of Gilbertville Co., all of which is owned by appellant Kenneth A. H. Nelson.

Appellants' Jurisdictional Statement raises a number of important questions concerning the soundness of the Commission's denying the section 5(2) application automatically on the ground that a violation of law had been found and without weighing other factors indicating that the proposed merger would be in the public interest or considering the innocent nature of the violation found, the appropriateness of the District Court's finding facts and relying upon a legal theory different from the facts found and theory relied upon by the Commission, and the adequacy of the Commission's findings and of their support by the evidence.² Appellees, in a Motion to Affirm, essentially contend, not that the questions raised are unsubstantial, but that the District Court's decision was correct. This Brief

¹ 49 U.S.C. §§ 5(4), 5(5), 5(6). The relevant sections of the Interstate Commerce Act and the Administrative Procedure Act are set forth in Appendix B (pp. A-82 - A-86) of appellants' Jurisdictional Statement.

² Appellees' statements (Motion to Affirm pp. 7, 8) that "[t]he Commission's subsidiary factual findings have never been contested by appellants" are unsupported by the record. Appellants have challenged the Commission's findings both as inadequate and as unsupported by substantial evidence in their petition to the Commission for reconsideration filed August 17, 1959, in the District Court and in this Court (Jurisdictional Statement pp. 22-34, 40-48). Indeed, appellants have demonstrated in their Jurisdictional Statement (pp. 40-48) that two of the findings appellees paraphrase and rely on (Motion to Affirm p. 8) are unsupported by substantial evidence.

is respectfully submitted in reply to the arguments made in that Motion to Affirm.³

ARGUMENT

A.

Appellees (Motion 8) urge this Court to deny plenary review of the decision of the District Court because the same *conclusion* was reached, on *one* of the issues involved, by the Examiner, Division 4, the full Commission and the District Court. Apparently appellees, by their emphasis on that coincidence, hope, to disguise the really significant fact—that each of the four previous decisions in the present case has been based on findings of fact and legal theories different from the findings and theories relied upon by the preceding decision. The four decisions below completely failed to agree as to what violation of law had occurred, or how or when it had occurred, or what ought to be done about it.⁴

³ Appellants' Jurisdictional Statement and appellees' Motion to Affirm (including their respective appendices) will be cited herein as "J. St." and "Motion", respectively, followed by the number of the page cited.

⁴ The decisions themselves admit that they agree only as to ultimate conclusion. Thus Division 4 said "We concur in the examiner's *conclusion* that Nelson and Gilbertville are controlled or managed in a common interest in violation of section 5(4)". (Motion 14b) (Emphasis added.) That the Commission affirmed the prior decisions only as to their conclusions stated in statutory language is shown by the Commission's statement — "we affirm the findings . . . that the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing in violation of section 5(4)" (Motion 29b-30b). (Emphasis added.) — as well as by the fact that the "affirmed" prior decisions were different. And the District Court's decision affirmed merely "the ultimate finding made by the I.C.C. [i.e., "the I.C.C.'s ultimate and essential finding 'that the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing in violation of section 5(4)'" (J. St. A-18)] and

The three decisions within the Commission were all quite different. The Examiner, relying on subsection 5(5)(a) and section 5(6), concluded that "at some time which cannot be determined on this record" there had been an innocent violation of section 5(4) which, although "presumably" continuing, did not warrant a finding of unfitness or denial of the section 5(2) application. He held that the proposed merger should be approved and the investigation proceeding should be terminated. (J. St. A-61—A-63, A-69, A-72, A-79, A-80). Division 4, without reference to any part of section 5(5) or to section 5(6), found a section 5(4) violation and held that *ipso facto* the section 5(2) application should be denied. (Motion 14b-16b). The Commission, obviously dissatisfied with Division 4's prior report, on reconsideration substituted a new report based exclusively on "the conclusive presumption" of subsection 5(5)(b) and section 5(6), and finding a violation "at the time he [Kenneth] purchased the stock of Gilbertville". (Motion 29b). The Commission, without a word of explanation, also added a decree of divestiture of the stock of Gilbertville Co. And while the legal theories were being changed, so were the facts. The Commission substituted a new and different "narrative statement" of facts for Division 4's "narrative statement", and Division 4's statement had differed substantially from the Examiner's findings.

Moreover, only four of the eleven Commissioners agreed with the Commission's report on reconsideration. Three Commissioners dissented, three, including the Commissioner who dissented from the two-to-one decision of Division 4, did not participate, and one concurred only in the result.

the derived legal *conclusion* announced by the I.C.C." (J. St. A-19) (Emphasis added.), not because they were based on findings of fact supported by substantial evidence and on sound reasoning, but because the District Court, by its findings of fact and its reasoning, found them "not merely reasonable but inevitable to an unprejudiced, sophisticated mind." (J. St. A-19)

The District Court in turn, ignoring this Court's oft-repeated ruling that "a judicial judgment cannot be made to do service for an administrative judgment",⁵ found facts and relied upon a legal theory different from the facts found and theory relied upon by the Commission.

Appellants have conclusively demonstrated (J. St. 14-20) that the District Court disregarded some of the Commission's findings of fact and made *de novo* (and erroneous) findings of fact different from other findings of the Commission. Some of these *de novo* findings by the District Court were made by inferring, erroneously, that facts "not shown" before the Commission would, if shown, have been harmful to appellants;⁶ thus the District Court held, contrary to section 7(c) of the Administrative Procedure Act (5 U.S.C. § 1006(c)), that the appellants, as respondents in the section 5(4) investigation, had the burden of proof before the Commission. Indeed, appellees admit (Motion 10-11, n. 4) that the District Court decided the case on facts different from those found by the Commission. And, although appellees attempt to characterize the District Court's *de novo* findings as "immaterial variations", plainly the District Court regarded its *de novo* findings as the most significant facts in the case. (See J. St. A-10, A-12).

That the District Court employed a legal theory different from the Commission's is, as appellants have shown (J. St. 8-10, 20-21), obvious from examination of the respective opinions: on one hand, the Commission relied exclusively upon the definition of "affiliated" in section 5(6) and "the

⁵ *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88; see, e.g., *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 270.

⁶ The District Court's "not shown" language (see J. St. 17-18 & n. 8) is the same as the language of the Commission recently condemned by this Court in *Interstate Commerce Commission v. J.T. Transport Company, Inc.*, 368 U.S. 81, 90.

conclusive presumption of section 5(5)" (Motion 29b); on the other hand, the District Court's "reasoning does not . . . require resort to any legislatively enacted definitions or presumptions." (J. St. A-19).

Two of the three arguments with which appellees try to justify the District Court's decision—that the Commission's decision was on alternative grounds and that the District Court decided on alternative grounds—are too obviously inconsistent with the Commission's report on reconsideration and the District Court's opinion to require extended discussion in this Brief.⁷ And appellees' third argument—that the difference in rationale makes no difference because sections 5(5) and 5(6) "are but specific examples" of common control prohibited by section 5(4) (Motion 9)—not only requires the unsound assumption that Congress would insert and maintain repetitive sections in the Interstate Commerce Act, but also ignores the plain meaning of the sections. Section 5(4), read alone, prohibits "control or management in a common interest of any two or more carriers"; whether that prohibition is violated is a question of fact and depends upon what is actually true. Sections 5(5) and 5(6), however, in effect prohibit the acquisition of a carrier by any person who has a "relationship" with

⁷ Appellees' theory seems to be that the Commission's recitation of affirmance of the ultimate findings or conclusions of prior decisions, phrased in the language of the statute, constitutes an adoption of the reasoning of those prior decisions as alternative grounds of the Commission's decision. But the Commission did not purport to affirm anything but the conclusion that the statute had been violated, and indeed the obvious purpose of the Commission's report on reconsideration was to substitute a different narrative statement and different reasoning based on sections 5(5) and 5(6). Moreover, read in context, the Commission's recitation of affirmance is simply the third step of the Commission's own conclusion — that it found Kenneth "affiliated" as defined in section 5(6), wherefore "the conclusive presumption of section 5(5) applies", wherefore the Commission found what section 5(5) conclusively presumes, a violation of section 5(4). See also note 4 *supra*.

another carrier if "it is reasonable to believe" certain things will happen. In other words, there is a violation by reason of section 5(4) alone only if certain facts actually exist, whereas there is a violation by reason of sections 5(5) and 5(6) if, and only if, certain things can be predicted.

Although Congress, as a drafting technique, inserted in section 5(6) a definition and in section 5(5) created a conclusive presumption of a section 5(4) violation based on the definition in section 5(6), Congress was well aware that the sections 5(5) and 5(6) prohibition was different from the section 5(4) prohibition. Both congressional reports state that the provisions which are now sections 5(5) and 5(6) "are necessary" in addition to what is now section 5(4). S. Rep. 87, 73d Cong., 1st Sess., at 9; H.R. Rep. 193, 73d Cong., 1st Sess., at 16. The special counsel for the House Interstate and Foreign Commerce Committee, who was one of the draftsmen of the provisions which are now sections 5(4), 5(5) and 5(6) and was their principal exponent in the hearings, stated that "it is the purpose of subdivision (b) [now section 5(5)] to establish as a rule of law that certain transactions which it might be argued ~~to~~ not come within the provisions of subdivision (a) [now section 5(4)] are to be considered as accomplishing or effectuating control or management in violation of subdivision (a) [now section 5(4)]." A number of examples of transactions which would be reached only by the sections 5(5) and 5(6) prohibition were given in the hearings and the House Report. *Hearings on H. R. 9059 Before the House Committee on Interstate and Foreign Commerce*, 72d Cong., 1st Sess., at 32-37; H. R. Rep. 193, 73d Cong., 1st Sess., at 17.

The prohibition of sections 5(5) and 5(6) obviously is, as Congress intended it to be, conceptually entirely different from the prohibition of section 5(4). A decision based on violation of the prohibition of sections 5(5) and

5(6)—such as the Commission's decision in the present case—inevitably is entirely different from a decision based on violation of the prohibition of Section 5(4) alone—such as the District Court's decision in the present case. Different questions of basic fact are relevant to the two decisions, and they pose different questions of ultimate fact and law.

Plainly issues which create such dissension within the Commission itself and create such disagreement among the Examiner, the Division, the Commission and the reviewing court not only warrant, but indeed require, plenary consideration and authoritative resolution by this Court.

B.

Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007(b)) requires that all decisions of the Commission "state findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record". Appellants have demonstrated (*J. St.* 22-34) that the Commission failed to make the findings required by section 8(b) as to three fundamental issues: (1) There is no statement of the "reasons or basis" for the ultimate finding that Kenneth was "affiliated" with Nelson Co. (2) There is no adequate finding that any violation was continuing. (3) There is no finding of any kind that it was "necessary" to require Kenneth to divest himself of the stock of Gilbertville Co.; indeed, the Commission's report does not even indicate that divestiture will be ordered. Appellees do not even cite the Administrative Procedure Act or claim that the Commission complied with the requirements of section 8(b). Just as the Commission's decision completely disregarded the requirements of the Administrative Procedure Act, appel-

⁸ *Ser.*, e.g., *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 192.

tees in their Motion to Affirm have completely ignored the very existence of those requirements:

1. The definition in section 5(6) of the Interstate Commerce Act requires, as the "basis" for finding a person "affiliated", that a certain kind of "relationship" be found; moreover, in order to invoke the conclusive presumption of section 5(5) the person must have been "affiliated", and therefore that "relationship" must have existed, when control of a carrier was acquired. Affiliation and the requisite "relationship" are clearly matters of fact which must be proved. See *Hearings on H.R. 20759 Before the House Committee on Interstate and Foreign Commerce* 72d Cong., 1st Sess., at 33-34. In the present case the Commission stated the ultimate finding that Kenneth was "affiliated" with Nelson Co. "at the time he purchased the stock of Gilbertville" (Motion 29b). But "an ultimate finding is not enough in the absence of a basic finding to support it"¹⁹ and the Commission's report contains no finding of the requisite "relationship". Indeed, the facts recited by the Commission show that there was *no* "relationship" between Kenneth and Nelson Co. "at the time he purchased the stock of Gilbertville"²⁰.

2. Section 5(7) of the Interstate Commerce Act, pursuant to which the Commission purported to act, empowers the

¹⁹ *New York Central R. Co. v. United States*, 99 F. Supp. 394, 401 (D. Mass. 1951) (Magruder, Ch. J.), *affirmed*, 342 U.S. 890. "And these basic findings should be clearly stated and identified as such, so that the reviewing court will not be groping in the dark as to the grounds for the Commission's ultimate conclusion." *Ibid*.

²⁰ Appellee's admit (Motion 10 n. 4) that the Commission found that Kenneth had resigned from Nelson Co. and sold his stock interest therein in 1951 and that Kenneth had ceased to serve Nelson Co. as a free-lance tariff consultant on March 1, 1953, all prior to Kenneth's purchase of the stock of Gilbertville Co. Thus appellees are unable to point to *any* "relationship" existing at the only time which the Commission specified — "at the time he purchased the stock of Gilbertville". Obviously appellees' suggestion that "In nevertheless, the transaction was developed earlier" cannot justify the Commission's decision that Kenneth was "affiliated" "at the time he purchased the stock of Gilbertville".

Commission to order remedial action only "to prevent continuance" of a violation found to be continuing. But in the present case the Commission has entered the harshest conceivable remedial order, requiring Kenneth to divest himself of the stock of Gilbertville Co., without making any adequate finding of a continuing violation.¹¹

Appellees apparently conceded that continuance must be found, but argue "that in finding the *fait accompli* of unlawful common control, the Commission necessarily found a continuing violation". (Motion 14, n. 6). But appellees' argument ignores the fact that the private parties involved, prior to Commission action, can, and should, terminate any violation voluntarily. For example, suppose that when X purchases the stock of A Trucking Co. X has some "relationship" to B Trucking Co. but X in good faith thinks that "relationship" does not make it "reasonable to believe" that "the affairs of any carrier" which X acquires "will be managed in the interest of" B Trucking Co. and X therefore does not think he is "affiliated" with B Trucking Co. And suppose that X's attorney or a Commission investigator or someone later suggests to X that he might well be found to be "affiliated" with B Trucking Co. and therefore in violation of the law. Such a violation would be terminated upon X's severing his "relationship" with B Trucking Co., and certainly the policy of the law requires that X be encouraged to do so. After X's voluntary

¹¹ The requirement that a violation be continuing is both apparent on the face of section 5(7) and confirmed by the legislative history of the section. (See J. St. 27-28) Yet, as appellants have shown (J. St. 28-29), neither the Commission nor Division 4 found continuance; they both referred to the Examiner's finding. And the Examiner had not found continuance, but only *presumed* it. The Examiner had no reason to make any finding as to continuance, for he held that the section 5(2) application should be approved and no remedial order should be entered. See *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39-40 (1958) ("in view of the finding in the application proceeding, . . . it was not necessary to determine whether the violation was continuing").

severance of his "relationship" with B Trucking Co., the Commission would have no jurisdiction to enter a remedial order. Moreover, in the present case, in contrast to the foregoing suppositions one, the Commission's subsidiary findings of fact show that Kenneth severed his relationship with Nelson Co. *prior to* his purchase of the stock of Gilbertville Co.

3. Section 5(7) only authorizes the Commission to "require such person to take such action as may be *necessary*, in the opinion of the Commission; to prevent continuance" of a violation found. (Emphasis added.) In the present case the Commission's order (Motion 35b) adds to the provisions of Division 4's order a direction of divestiture of the stock of Gilbertville Co., but the Commission's report does not contain even a suggestion that divestiture would be decreed, much less the reasons why divestiture is deemed necessary.

Appellants do not dispute that the Commission is given discretion by section 5(7). However, section 8(b) of the Administrative Procedure Act expressly requires "a statement of . . . findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of . . . discretion", and this Court has repeatedly insisted upon an explanation as to why a particular remedy was chosen. *E.g., Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177; *Siegel Co. v. Federal Trade Commission*, 327 U.S. 608; *Hughes v. United States*, 342 U.S. 353. Indeed, there is no indication in the present case that any discretion was exercised.

Appellees have cited, as justifying the Commission's default, two Federal Trade Commission cases, several previous decisions by the Interstate Commerce Commission, and this Court's recent decision in *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316. But none of those cases repeals the express requirement of section 8(b) of the

Administrative Procedure Act. Moreover, the Federal Trade Commission cases are completely irrelevant; they uphold an administrative agency's power to "fashion its relief to restrain other like or related unlawful acts",¹² but they do not suggest that the Interstate Commerce Commission may, without reasons, order Kenneth to sell the stock of his trucking company. The prior decisions by the ICC are all cases where the violations were blatant and willful,¹³ whereas in the present case the Examiner expressly found that appellants' alleged violations of law (if any) were innocent ones.¹⁴ Also, in each of the cited ICC decisions the Commission's report contains at least some consideration of the decree of divestiture, whereas in the present case divestiture was not even mentioned in the report. And this Court's careful weighing of the necessity for di-

¹² *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 392. The *Mandel Brothers* case decided that a defendant who had omitted 3 of 6 required items from his labels could be ordered to show all 6 required items on his labels in the future. The other case cited, *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, involved similar questions with respect to an order in a price discrimination case.

¹³ In *Central of Georgia Ry. Co.*, 307 I.C.C. 39 (1958), the respondent railroad had been engaged in a deliberate campaign of purchase of the stock of the Central of Georgia and had even purchased a substantial number of shares during the pendency of the investigation case before the Commission. *Id.* at 44, n. 4. *Houff Control-Elliott Brothers Trucking Co., Inc.*, 80 M.C.C. 637 (1959), involved a similar deliberate violation of law by purchase of stock in a second carrier. Both *Blück Investigation of Control-Colony Motor Transportation*, 75 M.C.C. 275 (1958) and *Greyhound Corp. Investigation of Control-Southern Limited, Inc.*, 45 M.C.C. 59 (1946) involved willful consummation of acquisitions which the Commission had previously disapproved in section 5(2) proceedings. And *Sellers Control-Huckabee Transport Corp.*, 80 M.C.C. 429, 450 (1959) involved intricate manipulations of money and people, which were "deliberate and worthy of censure in the strongest terms. This record shows how artful a plan was conceived".

¹⁴ The Examiner, having heard the evidence and personally observed the individual appellants, found that the alleged violations were "the result in some cases of ignorance of the requirements, and in others of a degree of carelessness and not willfulness". (J. St. A-72)

vestiture in the *duPont* case certainly does not excuse the Commission's failure to consider whether divestiture was necessary; indeed, the *duPont* decision is an excellent illustration of what the Commission failed to do.

In short, as this Court said in *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 392, "One cannot generalize as to the proper scope of these orders. It depends upon the facts of each case". No amount of citation or argument of counsel¹⁵ is a substitute for the Commission's consideration of and judgment upon the necessity for divestiture in this case.

When the Commission ruled that the section 5(2) merger application would be denied simply because of the fact that a violation of section 5(4) had been found and regardless of whether or not that violation was innocent,¹⁶ it was not

¹⁵ Appellants have suggested that the Commission should have considered the fact that "there is no possible reason why severance of Kenneth's connections with either carrier would not be a fully effective remedy. Thus it would have been entirely sufficient 'to prevent continuance of such violation', to order Kenneth and Nelson Co. to terminate whatever 'relationship' the Commission found to exist and or to enjoin control or management in a common interest (as both Division 4's order and one paragraph of the Commission's order actually did)." (J. St. 33) Or, of course, the Commission might have chosen the alternative of a voting trust, which it employed in *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39 (1958).

Appellees' counsel have alleged in their Motion (p. 13) that "[i]n view of the close relations between the appellants, and their illegal common activities heretofore, . . . [appellants' suggested alternative] would be ineffective to cure the violations found." But appellants respectfully submit that whether the suggested alternative (or some other alternative) would be effective or not is a decision to be made and explained by the Commission, in whom Congress vested discretion, not by appellees' counsel.

¹⁶ Despite the Examiner's finding that appellants did not willfully violate the law (see note 14 *supra*), appellees' argument assumes "[t]he evident purpose . . . of such violation". (Motion 14) (Emphasis added.)

merely weighing the violation of law together with the mandatory considerations specified by the statute (section 5(2)(c)) as it has done in the past.¹⁷ In the present case the Commission weighed no other criteria, for it held that the finding of violation of law conclusively required denial of the application. This rejection of all factors but one clearly was error, *cf. Interstate Commerce Commission v. J-T Transport Company, Inc.*, 368 U.S. 81, 88-90, and required the District Court to remand the case to the Commission, *cf. Schwabacher v. United States*, 334 U.S. 182, 201-202.

Moreover, appellees' argument that section 5(4) was "aimed" at barring mergers simply because they were "premature", i.e., prior to Commission approval (Motion 14-15), is based upon a mistaken concept of section 5(4). It is clear that all parts of section 5 of the Interstate Commerce Act were designed to promote the National Transportation Policy, *County of Marin v. United States*, 356 U.S. 412, 416-18; *Schwabacher v. United States*, 334 U.S. 182, 194 & n. 14; see 54 Stat. 899, and the particular role of section 5(4) was to forbid mergers which were inconsistent with the National Transportation Policy and the public interest. See *Hearings on H.R. 9059 Before the House Committee on Interstate and Foreign Commerce*, 72d Cong., 1st Sess. at 19-26. Inasmuch as a merger pre-

¹⁷ See *Central of Georgia Ry. Co.*, 307 I.C.C. 39, 41 (1958) (proposed acquiring carrier's financial condition and effect upon service and traffic interchange weighed); *Black - Investigation of Control - Colony Motor Transportation*, 75 M.C.C. 275, 282-83 (1958) (near-dormancy of rights to be acquired weighed); *Hough - Control - Elliott Brothers Trucking Co., Inc.*, 80 M.C.C. 637 (1959) and *Powell - Purchase - Rumpy*, 57 M.C.C. 597 (1951) (each weighing a long history of criminal violations, the former also considering apparent dormancy and lack of need for service, and the latter also considering proposed vendee's unprofitable operations of rights involved under a lease); *Sellers - Control - Huckabee Transport Corp.*, 80 M.C.C. 429 (1959) (considering deterioration of proposed vendor's financial condition while controlled by proposed vendee under temporary authority).

maturely carried out may nevertheless be in the public interest and desirable to promote the National Transportation Policy, it is obvious that the Commission, by its pre-occupation with "prematurity" to the exclusion of all other considerations, is acting contrary to the intent of Congress and the express language of the Interstate Commerce Act.

CONCLUSION

Appellants respectfully submit that the questions presented by this appeal are substantial and important questions which should be resolved by this Court after full argument and by reversing the decision of the District Court.

Respectfully submitted,

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In the
Supreme Court of the United States

OCTOBER TERM, 1962

No. 40

GILBERTVILLE TRUCKING CO., INC.,
THE L. NELSON & SONS TRANSPORTATION
COMPANY, CHARLES G. CHILBERG, CLIFFORD
J. O. NELSON, GRETA C. CARLSON, and
KENNETH A. H. NELSON,

APPELLANTS,

v.

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

APPELLEES.

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS**

BRIEF FOR APPELLANTS

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1962

No. 40

GILBERTVILLE TRUCKING CO., INC.,
THE L. NELSON & SONS TRANSPORTATION
COMPANY, CHARLES G. CHILBERG, CLIFFORD
J. O. NELSON, GRETA C. CARLSON, and
KENNETH A. H. NELSON,

APPELLANTS,

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

APPELLEES.

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS**

BRIEF FOR APPELLANTS

Appellants have appealed from a final judgment of the United States District Court for the District of Massachusetts which dismissed their suit to enjoin and set aside certain orders of the Interstate Commerce Commission.

OPINIONS BELOW

The opinion of the District Court for the District of Massachusetts, which contained its findings of fact and conclusions of law (R. 108-26), is reported at 196 F. Supp. 351. The Report of the Interstate Commerce Commission on Reconsideration (R. 11-24) is reported at 80 M.C.C. 257; the Prior Report by Division 4 (R. 81-93) is reported at 75 M.C.C. 45; the Report of the Examiner (R. 30-80) is unpublished.

JURISDICTION

This suit was brought in the court below pursuant to 28 U.S.C. § 1336 and 49 U.S.C. § 17 (9) (54 Stat. 916 (1940)), and was heard and determined by a district court of three judges as required by 28 U.S.C. § 2325. The judgment of the District Court was entered on July 18, 1961, and notice of appeal was filed in that Court on September 11, 1961. (R. 127) The Jurisdictional Statement was filed November 10, 1961, and probable jurisdiction was noted by this Court February 19, 1962 (R. 688). The jurisdiction of this Court to review the District Court's judgment on this direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b) and has been sustained in, e.g., *Minneapolis & St. Louis Railway Co. v. United States*, 361 U.S. 173; *County of Marin v. United States*, 356 U.S. 412; *McLean Trucking Co. v. United States*, 321 U.S. 67.

QUESTIONS PRESENTED

1. Did the Commission and the District Court fail to comply with essential requirements of the Administrative Procedure Act, the Interstate Commerce Act and the decisions of this Court, in that, although the Commission's Re-

port indiscriminately states a number of facts (including many trivial, irrelevant, innocent and ambiguous matters).

a. the ultimate conclusions asserted by the Commission were not supported by necessary basic findings, by reasoning or by any explanation whatsoever?

b. the District Court's purported affirmance of the Commission was based upon findings and assumptions of fact by the District Court which were contrary to findings made by the Commission, rejection of other facts upon which the Commission may well have relied, and a legal theory different from that upon which the Commission had decided the case?

2. Did the Commission err in ruling that a finding of a violation of law compels the denial of an application for approval of a proposed merger

a. even if the proposed merger is consistent with the public interest?

b. even if the supposed violation found was innocent?

3. Did the Commission fail to comply with essential requirements of the Administrative Procedure Act, the Interstate Commerce Act and the decisions of this Court by ordering an individual to sell all of the stock of a specified carrier without having found such an order necessary?

4. Did the District Court err in affirming the Commission's decision without finding or being able to find that the Commission's decision or its findings were supported by substantial evidence on the whole record?

STATUTES INVOLVED

Relevant parts of sections 7(c), 8(b), and 10(c) of the Administrative Procedure Act (60 Stat. 241, 242, 243; 5 U.S.C. §§1006(c), 1007(b), 1009(c)), the National Transportation Policy (54 Stat. 899), and sections 5(2), 5(4), 5(5), 5(6), and 5(7) of the Interstate Commerce Act, as

amended (54 Stat. 905, 907, 908, 63 Stat. 485; 49 U.S.C. 5(2), 5(4), 5(5), 5(6) and 5(7)) are set forth as Appendix A hereto, and are hereinafter cited by act and section number alone.

STATEMENT

On October 6, 1955, seven years ago, two incorporated interstate motor carriers, The L. Nelson & Sons Transportation Company (hereinafter called Nelson Co.) and Gilbertville Trucking Co., Inc. (hereinafter called Gilbertville Co.) filed with the Interstate Commerce Commission a joint application pursuant to section 5(2) of the Interstate Commerce Act. The application sought Commission approval of a proposed transaction by which Nelson Co. would acquire control of Gilbertville Co. (through an exchange of stock and subsequent merger of the two carriers) and derivative control of Gilbertville Co. would be acquired by Nelson Co.'s two principal stockholders, Charles G. Hilberg and Clifford J. O. Nelson, who are also directors and, respectively, president and treasurer and secretary and assistant treasurer of Nelson Co. (Pl. Ex. A¹ at R. 131-81, 195-96.)

Nelson Co., a Connecticut corporation domiciled at Ellington, Connecticut, does business as a common carrier by motor vehicle in interstate commerce. It holds irregular route authority to transport general commodities intrastate in Connecticut and Massachusetts and specified commodities associated with the manufacture of cloth inter-

¹ The entire record of proceedings before the Commission (which was offered in evidence at R. 103 and admitted at R. 107) was marked as "Plaintiff's Exhibit A." Inasmuch as that "Plaintiff's Exhibit A" comprises the bulk of the printed Transcript of Record before this Court (R. 131-688), portions thereof will hereinafter be cited only by the page or pages in the Transcript of Record where the specific portion referred to may be found.

state between certain points in New England and certain other points in New England, New York, New Jersey and Pennsylvania. (R. 12, 39-40, 144-45)

• Gilbertville Co. is a Massachusetts corporation domiciled at Gilbertville, Massachusetts. It is a common carrier by motor vehicle in interstate commerce authorized to carry general commodities over regular and irregular routes within Massachusetts and over irregular routes between certain points in Massachusetts and other points in New York, New Jersey, Connecticut and Rhode Island and to carry specified commodities over some regular and some irregular routes among certain points in New England, New York, New Jersey and Delaware. (R. 12, 40-42, 154-61)

On December 20, 1955, two and a half months after the application was filed, the ICC, acting under section 5(7) of the Interstate Commerce Act, initiated an investigation to determine whether control and management of the two carriers in a common interest had already been effectuated in violation of section 5(4) of the Interstate Commerce Act. The respondents named in the investigation proceeding were the two corporate and two individual applicants and, in addition, Kenneth A. H. Nelson, who is president, treasurer and a director of Gilbertville Co. and the beneficial owner of all of its stock, and Greta C. Carlson, who is vice-president, a director and the minority shareholder of Nelson Co. (R. 181-82, 195-96, 216, 444)

Proceedings on the application and proceedings on the investigation, numbered respectively MC-F-6009 and MC-F-6178 on the dockets of the ICC, were consolidated for hearing and decision. (R. 182) The two proceedings were further commingled in the Commission's Report, for the decision in the investigation proceeding eventually became the sole reason for denial of the application. (R. 21-23)

After a lengthy hearing held in September 1956, the Examiner concluded that the application should be granted.

thus rendering the investigation moot: He found that "the case in hand appears to be on the borderline" with respect to the alleged violation of section 5(4) (R. 64), but, citing the statutory conclusive presumptions of sections 5(5) and 5(6) of the Interstate Commerce Act (R. 63-64), he held that control and management of Nelson Co. and Gilbertville Co. in a common interest "were effectuated" and "are *presumably* continuing." (R. 64; accord, R. 70) (Emphasis added.) Nevertheless he found that the proposed merger should be approved pursuant to section 5(2) because it would be in the public interest. (R. 78) The Examiner expressly found that the merger would not be harmful to competition (R. 74-76),² would not adversely affect employees (R. 78), and would result in substantial savings (R. 76) and, on the basis of his personal observation of the individual applicants in the hearing before him, he further found that the applicants were not unfit:

In the case at bar, there is no evidence of extensive or flagrant violations of either the act or the regulations. The violations shown and the circumstances in which they occurred do not establish a persistent disregard for regulation. Rather, they appear to be the result in some cases of ignorance of the requirements, and in others of a degree of carelessness and not wilfulness. *The principals are youthful and are of such caliber that their experiences at the hearing herein can be expected to make them more conscious of and responsive to regulation.* They earnestly deny that what has been done in respect of Gilbertville and Nelson amounts to effectuation of control in a common interest and on this record their view on that

² Gilbertville Co. and Nelson Co. are both small carriers, especially compared to the large carriers and groups of carriers with whom they must compete. (R. 53-60, 76)

point cannot be said to be wholly groundless. Such control is not the result of any one act or transaction, but is the result of an evolution and a cumulation of acts, transactions and practices, the ultimate consequence of which may not be readily obvious to the layman. *A finding of unfitness by reason of violations is not warranted.*" (R. 72-73) (Emphasis added.)

Division 4, by a two to one decision, also held that section 5(4) had been violated, although it never even cited the presumptions of sections 5(5) and 5(6); instead, Division 4 based its "finding in this respect . . . on the entire chain of circumstances revealed by the record." (R. 91) Ignoring the Examiner's finding of fact that the applicants were not unfit (although it had adopted the Examiner's factual statements "as our own" (R. 83)), Division 4 denied the section 5(2) application because "a violation of the law should not be rewarded, . . . existing carriers endeavoring faithfully to comply with the law should be encouraged and protected" and "violations of the law and of the regulations should not be 'blessed' by approval." (R. 92-93) Division 4 ordered the respondent to "terminate the violation of the provisions of section 5(4)." (R. 94)

The Commission recalled the proceedings from Division 4 after they were reopened on appellants' petition for reconsideration. In the resulting Report, to which four of the eleven Commissioners agreed,³ the Commission relied upon the conclusive presumptions of sections 5(5) and 5(6):

"Considering all facts of record, we are of the opinion, and find, that Kenneth Nelson was affiliated

³ Four of the eleven members of the Commission constituted the majority; another concurred only in the result. Three Commissioners dissented and another who had dissented from the decision of Division 4 was among the three who did not participate in the full Commission's decision. (R. 24, 93)

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with Nelson [Co.] within the meaning of section 5(6) at the time he purchased the stock of Gilbertville [Co.] and that the conclusive presumption of section 5(5) applies; we affirm the findings in the prior report, and in the report of the examiner, that the control and management of Nelson [Co.] and Gilbertville [Co.] in a common interest has been effected and is continuing in violation of section 5(4) of the act." (R/21) (Emphasis added.)

Then the Commission, adopting the language used by Division 4, held that the section 5(2) application must automatically be denied because section 5(4) had been violated. (R. 21-23) However, the Commission's order (R. 25-26) not only reinstated all the terms of Division 4's order, including the requirement that the respondents "terminate the violation of section 5(4) of the Interstate Commerce Act," but also

"further ordered, That the said respondents be, and there are hereby, required to divest themselves of any and all interest which they may have in the capital stock of Gilbertville Trucking Co., Inc. . . ." (R. 26)

The Report of the Commission contains not a single word of justification or explanation of that addition.

After both a petition for reconsideration and a petition suggesting an alternative to the divestiture ordered had been summarily denied by the Commission, the appellants filed their Complaint seeking judicial review by the United States District Court for the District of Massachusetts, whereupon, on appellants' petition, the Commission postponed the effective date of its order. The appellants urged in the District Court, as they had urged before the Commission, that the Commission's decision was inconsistent

with the relevant provisions of both the Administrative Procedure Act and the Interstate Commerce Act and wholly without support either by adequate basic findings or by substantial evidence on the whole record.

The District Court rejected each contention: First, after making certain *de novo* findings of facts in what it called a "syllabus", the District Court copied from defendants-appellees' brief "in full the essential portion of the text" of the Commission's Report "with the supporting transcript references conveniently supplied by defendants". (R. 115) The District Court held that the Commission made sufficient findings and that the Commission's statements were "supported by evidence". (R. 121) Secondly, appraising its *de novo* findings of fact as well as the Commission's statements, the Court held that the ICC's ultimate conclusion that section 5(4) was violated is "inevitable to an unprejudiced, sophisticated mind" and affirmed that ultimate conclusion. (R. 122-23) But, although the Commission had relied upon the conclusive presumptions of sections 5(5) and 5(6), the District Court's "reasoning does not... require resort to any legislatively enacted definitions or presumptions." (R. 123) Finally, according to the District Court, no findings or reasoning were necessary to support the divestiture order (R. 125), and denial of the section 5(2) application merely because a section 5(4) violation had been found was "a clearly proper exercise of a delegated discretionary authority." (R. 126)

Further facts are stated hereinafter where they are necessary to the argument.

SUMMARY OF ARGUMENT

1.a. The Commission's decision was inadequate because it did not contain the basic findings and reasoning which have been made fundamental requirements of administrative action by statute and by numerous decisions of this Court. Administrative Procedure Act §8(b); *Florida v. United States*, 282 U.S. 194, 215; *United States v. Chicago, M., St. P. & Pac. R.R. Co.*, 294 U.S. 499, 504-05, 510-11. The Commission thus failed to articulate the basis of its decision as to two critical issues of fact and law: (1) The Commission's conclusion that appellants had violated section 5(4) of the Interstate Commerce Act was presumed from its ultimate finding that Kenneth was "affiliated" with Nelson Co. within the meaning of section 5(6) of the Act. (R. 21) But that ultimate finding of affiliation had to be premised on the existence at a certain time of the kind of "relationship" between Kenneth and Nelson Co. specified by section 5(6), and the Commission neither stated what "relationship" it thought existed nor gave any indication of what facts or reasoning led it to its ultimate finding of affiliation. (2) Section 5(7) of the Interstate Commerce Act gave the Commission authority to issue a remedial order only to prevent the "continuance" of a violation of section 5(4). The Commission's formal recitation that the violation which it found was "continuing" is completely without the support of any basic findings or reasoning. (R. 21)

b. The District Court not only failed to remand the case to the Commission for a statement of necessary basic findings and reasons, but it exceeded its limited role of judicial review, see *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87-88, in refusing to rely on section 5(6) (R. 123), as the Commission had done (R. 21), and

thus deciding the case upon grounds different from those relied upon by the Commission, by making certain findings of its own which were, in part, inconsistent with those made by the Commission (R. 115-116) and by disregarding as "trivial," irrelevant, "innocent," and "ambiguous" (R. 121-22) certain findings upon which the Commission may have relied.

2. The Commission disregarded the Interstate Commerce Act in concluding that its finding of a section 5(4) violation required automatic denial of the appellants' application for merger approval. (R. 21-23). Applications are to be approved if they are found to be "consistent with the public interest." (5(2)(b)). As this Court has held, the National Transportation Policy is the Commission's guide to the public interest, *Mallean Trucking Co. v. United States*, 321 U.S. 67, 82; and section 5(2)(c) of the Act also lists certain "considerations" "among others" to which the Commission is required to "give weight" in determining the public interest. The Examiner applied the statutory standards, and his basic findings clearly demonstrated that the merger would be in the public interest (R. 74-78); but the Commission ignored both the National Transportation Policy and the mandatory "considerations" in denying the application (R. 21-25), thus plainly exceeding its authority. See, e.g., *Interstate Commerce Commission v. J-T Transport Co., Inc.*, 368 U.S. 81, 89. Moreover, the Commission's making a finding of violation of section 5(4), an absolute bar to approval of a section 5(2) application both irrationally ignores the distinction between a willful and an innocent "law violation" and tends to defeat the overall policy of section 5 of the Act.

3. The Commission gave no "clear indication" that its order that Kenneth divest himself of his Gilbertville stock (R. 26) was based upon a true exercise of discretion that

is, deliberation and judgment upon all pertinent factors. *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 197. Although the requirement that an administrative order be issued only pursuant to an exercise of discretion is underscored in this case by the provision in section 5(7) of the Interstate Commerce Act that remedial orders must be "necessary," the Commission's Report included no findings or reasons with respect to this important issue of necessity. It is well settled that a harsh administrative order, such as divestiture, can be justified only where there is a clear showing that alternative remedies have been considered and found wanting. *Jacobs Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 613; see, e.g., *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 602-603; cf. *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316, 327. The Commission's order that Kenneth strip himself of his entire interest in the company in which he has invested 9 years of his life as the sole owner and operator, in circumstances making a fair price impossible, is uniquely drastic. And apparently effective alternatives, such as an order requiring Kenneth to sever whatever relationship underlay the Commission's finding that he was affiliated with Nelson Co., were obviously available.

4. Finally, not only is the record without substantial evidence to support the Commission's decision or a number of its findings, but the District Court did not even purport to find the Commission's decision or findings supported by substantial evidence on the whole record.

ARGUMENT

I. IN DECIDING CRITICAL ISSUES AS TO VIOLATION OF LAW AND CONTINUANCE THEREOF, THE COMMISSION AND THE DISTRICT COURT DISREGARDED THE ELEMENTARY PRINCIPLES REQUIRING THAT THE COMMISSION'S DECISION DISCLOSE THE GROUNDS UPON WHICH IT WAS BASED AND BE JUDICIALLY REVIEWED UPON THOSE GROUNDS.

A. *The Commission failed to state basic findings or reasoning adequate to disclose the grounds for its ultimate findings on those issues.*

The Commission's Report in the present case failed to state any basic findings or reasoning supporting or explaining its decision as to two crucial issues. The Report does not disclose how or why or on what factual bases (if any) the Commission reached its ultimate findings or conclusions (1) that Kenneth was "affiliated" with Nelson Co., so that appellants were guilty of a section 564 violation and (2) that the violation was a continuing one. Thus the Commission's decisions failed to satisfy minimum standards of articulation and explication established by this Court and the Administrative Procedure Act.

This Court has "repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest. *Florida v. United States*, 282 U.S. 194; *United States v. Baltimore & O. R. Co.*, 293 U.S. 454; *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475." *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626, 634. "For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review." *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 94. These fundamental principles have been codi-

find in section 5(b) of the Administrative Procedure Act, which requires that every decision of the Commission "include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record."

1. Whether the respondents were guilty of effectuating "control or management in a common interest" of two carriers was a fundamental issue of fact and law in the present case. Yet the only clue to the Commission's reasoning on that fundamental issue is one abrupt, conclusory sentence: "Considering all facts of record, we are of the opinion, and find, that Kenneth Nelson was affiliated with Nelson within the meaning of section 5(6) [of the Interstate Commerce Act] at the time he purchased the stock of Gilbertville, and that the conclusive presumption of section 5(5) applies; we affirm the findings in the prior report, and in the report of the examiner, that the control and management of Nelson and Gilbertville in a common interest has been effected . . ." (R: 21)

By working backwards and examining the language of section 5(5), a portion of the Commission's reasoning may be deciphered: The last clause of the quoted sentence (the conclusion that "control and management . . . in a common interest has been effected") is the inevitable result of "the conclusive presumption of section 5(5)", for section 5(5) (b) provides that "any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers — . . . if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier . . ." Thus (it may be inferred) the Commission referred

* * * There can be no doubt that the Administrative Procedure Act applies to proceedings before the Commission. *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 192.

to Kenneth's purchase of all of the stock of Gilbertville Co., which was certainly a "transaction" placing Kenneth in control of Gilbertville Co. because of "control" if Kenneth was "affiliated" with Nelson Co. at the time of that purchase. "The conclusive presumption of section 5(4) applies," and section 5(4) is therefore deemed to have been violated.

But the Report gives no hint as to how and why the Commission reached the all-important ultimate finding that Kenneth was "affiliated" with Nelson Co. As Chief Judge Magruder said in *New York Central R. Co. v. United States*, 99 F. Supp. 394, 401 (D. Mass. 1951), *affirmed*, 242 U.S. 890.

"[A]n ultimate finding is not enough in the absence of a basic finding to support it. . . . And these basic findings should be clearly stated and identified as such, so that the reviewing court will not be groping in the dark as to the grounds for the Commission's ultimate conclusion."

Basic findings may not be inferred from ultimate findings. E.g., *Colorado Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626, 634; *Florida v. United States*, 282 U.S. 194, 215.

Section 5(6) says that "a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier . . . it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier." Whether the requisite relationship, and therefore "affiliation," existed is clearly an issue of fact as to which the Commission's Bureau of Inquiry and Compliance (hereinafter called the Bureau) had the burden of proof. See *Hearings on H. R. 9079 Before the House Committee on Interstate and Foreign Commerce*, 72d Cong.,

1st Sess. at 33-34 (1932); Administrative Procedure Act, 7(c). Thus, to have found Kenneth "affiliated" (as it did), the Commission should first have found that the Bureau had proved the existence of a "relationship" between Kenneth and Nelson Co., at the time Kenneth bought the stock of Gilbertville Co., which would have made it "reasonable to believe that the affairs of" Gilbertville Co. would be managed in the interest of Nelson Co. But no basic finding of that kind of "relationship" is "clearly stated and identified as such" in the Commission's Report. The parties and this Court are truly left "groping in the dark" for the "relationship" (if any) which the Commission may have thought was proved by the Bureau.

Such "groping in the dark" is particularly difficult in the present case, first, because the Commission's ultimate finding that "Kenneth Nelson was affiliated" is appended to a two-page recitation of miscellaneous factual statements (R. 19-21), wherein many facts which, as the District Court held (R. 121-22), are "trivial to the point of demonstrable irrelevance", "innocent" and "ambiguous" are indiscriminately commingled with statements which, as will be shown (see pp. 47-54, *infra*), are not supported by substantial evidence on the whole record, and, secondly, because the Commission did not limit itself to the factual statements on those two pages, but rather purported to make that ultimate finding upon "all facts of record" (R. 21).⁵ Further-

⁵ Sweeping statements that the Commission examined "all the evidence" or "all facts" are not satisfactory substitutes for basic findings. See *Beaumont, Sour Lake & Western Ry. Co. v. United States*, 282 U.S. 74, 86; *Atlantic & St. Andrews Bay Ry. Co. v. United States*, 104 F. Supp. 193 (M. D. Ala. 1952). "This Court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained." *Florida v. United States*, 282 U.S. 194. Recently the Court has repelled the

more, in the present case such "groping in the dark" must also be fruitless, for no such "relationship" can be found. Nowhere in the Commission's factual recitation or elsewhere in the Report is there any indication of a "relationship" which would support the assertion that "Kenneth Nelson was affiliated."

In fact, the Commission's express findings (R. 19) show that Kenneth had ceased to be an officer or director or stockholder of Nelson Co. long before he bought the stock of Gilbertville Co., and that even the connection between Kenneth and Nelson Co., as, respectively, free-lance tariff consultant and client had ended by March 1, 1953, before Kenneth even signed the contract to buy Gilbertville Co.'s stock.⁸ Upon "all facts of record", the only relationship

suggestion that lack of express findings by an administrative agency may be supplied by implication." *Atchison, Topeka & Santa Fe R.R. Co. v. United States*, 295 U.S. 193, 201-02; see also *Inland Motor Freight v. United States*, 60 F. Supp. 520, 521 (E. D. Wash. 1945).

⁸ In this case it cannot be said even that there "lack in this report phrases or sentences suggestive" of the required "relationship". *United States v. Chicago, M., St. P. & Pac. R.R. Co.*, 291 U.S. 409, 510.

⁹ Shortly after the death of Mrs. Linnear Nelson in 1950, four of her seven children, including Kenneth, resigned their respective positions with Nelson Co., sold their stock, and went their separate ways. Specifically, Kenneth resigned and sold all his stock (including the shares he expected to receive from his mother's estate) in September 1951. (R. 188-98, 255-62, 272-76, 282-83, 290-92) Kenneth's contract to buy the stock of Gilbertville Co. was dated March 2, 1953 and signed March 3, 1953, and the transaction was not consummated until July 24, 1953. (R. 308, 667-70)

⁸ Moreover, regardless of the dates involved, it would scarcely be "reasonable to believe"—indeed, it would be incredible—that Kenneth would manage the affairs of Gilbertville Co., of which he was sole equitable owner and in which he had invested substantial amounts of his own money and money borrowed on his personal credit (R. 202-214, 328-337), in the interest of Nelson Co., in which he had no financial interest. (R. 198). Furthermore, whereas a free-lance tariff consultant is an independent contractor, see, e.g., *State v. E. J. Domb & Co.*, 96 Atl. 605, 610 (RI, 1916); *Gulf & Southern Transportation Co., Inc. — Extension — Century, Florida*, 71 M.C.C. 1, 2 (1957); see also R. 105-06, 181, 242-43, 276, 504, the normal meaning of "affiliated" suggests dominant and subordinate roles. And in the con-

which Kenneth had to Nelson Co. "at the time he purchased the stock of (Gilbertville)" was a blood relationship—Kenneth was (and still is) a brother and half brother, respectively, of the three owners of Nelson Co. But surely, the Commission has not *sub silentio* laid down a rule of law that whenever a man is a brother of the owners of a carrier he is "affiliated" with that carrier. Indeed, in light of the legislative history of sections 5(5) and 5(6), which were aimed at the giant railroad holding companies of the 1930s,⁹

text of railroad-motor carrier mergers, "affiliated" as used in section 5(6) has apparently been understood to imply subordination. Both this Court and the Commission have paraphrased the expression "a carrier by railroad . . . or any person which is controlled by such a carrier, or affiliated therewith . . ." (§5(2)(b)) as "rail carriers or their affiliates," and have referred to the proviso containing that language as an example of the strong Congressional policy "against railroad invasion of the motor carrier field". *American Trucking Assocs. v. United States*, 364 U.S. 1, 6, 7. See also *American Trucking Assocs. v. United States*, 335 U.S. 141, 147; *Nacavo Freight Lines, Inc. v. United States*, 186 F. Supp. 377, 382 (D.D.C. 1960). Compare S. Rep. No. 87, 73d Cong., 1st Sess. at 9 (1933) (Pennsylvania Railroad Company "dominated" its "affiliate", the Pennroad Company).

⁹ See, e.g., S. Rep. No. 87, 73d Cong., 1st Sess. at 9 (1933); H.R. Rep. No. 193, 73d Cong., 1st Sess. at 19 (1933); *Hearings on H.R. 9059 Before the House Committee on Interstate and Foreign Commerce*, 72d Cong., 1st Sess. at 10 (1932). The legislative history also refers to other "ingenious legal devices." S. Rep. No. 87, *supra*, p. 9; H.R. Rep. No. 193, *supra*, p. 16; 77 Cong. Rec. 4258. One recurrent example in the legislative history which was typical of the powerful and complex corporate structures built up to gain control of elaborate railroad systems was the Allegheny Corporation, a holding company at the focal point in the so-called VanSweringen system. The best insight is gained by reference to the detailed chart opposite p. 878 of Part II of H. R. Rep. No. 2789, 71st Cong., 3d Sess. (1931), but even a summary of one small part gives the flavor of the legislative history. Using the Erie Railroad as the carrier controlled, control was acquired in the following manner: I. Stock of the Erie was owned by the Geneva Corporation (.3572%), the Virginia Transportation Corporation (.233609%) and the Allegheny Corporation (.70463%). II. A. (1) The Geneva Corporation was owned by the Vanness Company (100%). (2) The Vanness Company was owned by the VanSweringen brothers, as partners (80%). B. (1) The Virginia Transportation Corporation was owned by the Chesapeake & Ohio Ry. (100%). (2) The Chesapeake & Ohio was owned by (a) the VanSweringens, as partners (.0024%), (b) the Allegheny Corporation

the notion that fraternity might be such a "relationship" as to make Kenneth an affiliate¹⁰ of Nelson Co. is quite incongruous.

2. In entering its remedial order and, in particular, in ordering Kenneth to dispose of the stock of Gilbertville Co., the Commission purported to act pursuant to section 5(7) of the Interstate Commerce Act, which empowers the Commission, if it "finds after such investigation that such person is violating" section 5(4), to order "such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation." (Emphasis added.) Obviously section 5(7) only authorizes the Commission to prevent further continuance of a continuing violation; it does not permit the Commission to punish, redress, or otherwise remedy a past violation which has been voluntarily termi-

(.0063%), and (c) the Chesapeake Corporation (.54.3817%). (3) The Chesapeake Corporation was owned (a) by the VanSweringens, as partners (.0020%), (b) the New York Chicago & St. L. R.R. (.0459%) and (c) the Allegheny Corporation (.70.9211%). (4) The New York, Chicago & St. L. R.R. was owned (a) by the Allegheny Corporation (.49.5717%) and (b) by the VanSweringens, as partners (.0006%). (5) (1) The Allegheny Corporation was owned by the Vanness Company (2%) and the General Securities Corporation (39.75%). (2) The General Securities Corporation was owned by the Vanness Company (56%) and the VanSweringens, as partners (39%). Many of the corporations here named were also tied to each other and to others in achieving control of other railroads.

¹⁰ The concrete example of an "affiliate" which predominates in both the voluminous three-part report, H.R. Rep. No. 2789, 71st Cong., 3d Sess., (1931), and the extensive *Hearings on H.R. 9059, Before the House Committee on Interstate and Foreign Commerce*, 72d Cong., 1st Sess., (1932); was the relationship which the Pennroad Company bore to the Pennsylvania Railroad Company. Pennroad was organized by the managers of the Railroad, and was tied to the Railroad by (1) 8 of 11 directors who occupied or had occupied positions as directors or officers of the Railroad; (2) a 10-year voting trust of all of the common stock of Pennroad of which the three trustees were initially directors or officers of the Railroad; and (3) the fact that voting trust certificates were offered only to stockholders of the Railroad (and one investment advisory firm). In addition, many railroads were owned jointly, directly or indirectly, by the Railroad and Pennroad. H.R. Rep. No. 2789, *supra*, Vol. II, at 632-714; *Hearings, supra*, at 33-34.

nated or has otherwise ceased. In other words, although section 5(4) forbids both the effectuation or accomplishment of control or management in a common interest and the maintenance or continuance of such control or management after it has been effectuated, Congress was well aware of the distinction between effectuation and continuance and deliberately restricted the Commission's powers pursuant to section 5(7) to the prevention of continuing violations. See H. R. Rep. No. 193, 73d Cong., 1st Sess. at 16, 17 (1933); S. Rep. No. 87, 73d Cong., 1st Sess. at 9, 10 (1933).¹¹

Whether the violation the Commission found was a continuing one is thus one of the "material issues of fact," as to which section 8(b) of the Administrative Procedure Act clearly required a statement of findings and "the reasons or basis therefor." Indeed, it is an issue open to grave doubt: The Commission's ultimate finding of a violation was simply presumed from an assertion (unsupported, as has been shown) of "affiliation" at a specified time — "at the time he [Kenneth], purchased the stock of Gilbertville." (R. 21) If the supposed "relationship" necessary to support an ultimate finding of "affiliation" was severed at some later time, the violation would not be continuing.¹²

¹¹ In this respect section 5(7) is unusual, if not unique, among grants of administrative remedial power. Compare, e.g., National Labor Relations Act § 10(c), as amended, 61 Stat. 147 (1947), 29 U.S.C. § 160 (c) (order issued if Board finds any person "has engaged in or is engaging in any such unfair labor practice"); Federal Trade Commission Act § 5(b), as amended, 52 Stat. 112 (1938), 15 U.S.C. § 45(b) (complaint issued if FTC believes any person "has been or is using any unfair method of competition" and order issued if FTC finds that method of competition prohibited).

¹² Surely private parties, prior to Commission action, can, and should, terminate any violation voluntarily. For example, suppose that when X purchases the stock of A Trucking Co. X has some "relationship" to B Trucking Co. but X, in good faith thinks that "relationship" does not make it "reasonable to believe" that "the affairs of any carrier" which X acquires "will be managed in the interest of" B Trucking Co. and X therefore does not think he is "affiliated" with B Trucking Co. And suppose that X's attorney or a Commission investigator or

Yet the Commission's Report contains no findings with respect to continuance other than its ritualistic ultimate finding (R. 23-24), which clearly is not enough. See cases cited at p. 15 *supra*. Nothing is added by the Commission's statement that "we affirm the findings in the prior report, and in the report of the examiner, *that* the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing in violation of section 5(4) of the act." (R. 24) (Emphasis added.) That statement is merely an ultimate finding which affirms previous ultimate findings. Nor were there adequate basic findings with respect to continuance in either the Prior Report or the Examiner's Report: Division 4 made no finding of continuance at all, but merely purported to "concur in the examiner's conclusion." (R. 91) And the Examiner was unable to find, on the basis of evidence pertaining to the years 1953 through 1955, that a violation was continuing in 1956; he merely *presumed* it. (R. 64, 70)¹³

Someone later suggests to X that he might well be found to be "affiliated" with B Trucking Co. and therefore in violation of the law. Such a violation would be terminated upon X's severing his "relationship" with B Trucking Co., and certainly X ought to be encouraged to do so. After X's voluntary severance of his "relationship" with B Trucking Co., the Commission would have no jurisdiction to enter a remedial order pursuant to section 5(7). Moreover, in the present case, in contrast to the foregoing suppositious one, the Commission's findings show that Kenneth severed every conceivably relevant relationship with Nelson Co. prior to his purchase of the stock of Gilbertville Co. See notes 7 & 8, *supra*.

¹³ It is clear that a finding of the continued existence of illegal activity may not be presumed but must be based upon actual facts. See, e.g., *Amalgamated Meat Cutters & Butcher Workmen v. National Labor Relations Board*, 352 U.S. 153, 156-57 (Frankfurter, J. concurring); cf. *Bollenbach v. United States*, 326 U.S. 607. However, in the present case no finding as to continuance was necessary to the Examiner's Report, for he held that the section 5(2) application should be approved and no remedial order should be entered. See *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39-40 (1958) ("in view of the finding in the application proceeding, . . . it was not necessary to determine whether the violation was continuing").

- B. *The District Court erred by deciding the issues as to violation of law upon findings of fact and a legal theory different from those relied upon by the Commission.*

The District Court in the present case disregarded its special role and responsibilities as a reviewing court pursuant to section 10 of the Administrative Procedure Act and usurped fact-finding and decision-making functions committed by Congress to the Commission. Because, as has been shown, the Commission's decision in the present case lacked necessary basic findings and reasoning as to two fundamental issues, those issues could not be subjected to meaningful judicial review and the District Court was required to set aside the Commission's decision and remand the case to the Commission. See, e.g., *United States v. Chicago, M., St. P. & Pac. R.R. Co.*, 294 U.S. 499. But, instead, the District Court (1) disregarded some facts which the Commission apparently had considered, (2) made its own findings and assumptions of fact which were inconsistent with the Commission's findings, and (3) relied upon a legal theory different from the theory upon which the Commission's decision was based. The District Court then purported to affirm "the ultimate finding made by the I.C.C. and the derived legal conclusion announced by the I.C.C." (R. 122), not because they were supported by basic findings of fact, substantial evidence and sound reasoning, but because the District Court, upon a different view of the facts and a different legal theory, found the Commission's "ultimate finding" and "conclusion" "not merely reasonable but inevitable to an unprejudiced, sophisticated mind." (R. 122-23).

The District Court thus violated the principles enunciated by this Court in *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87, 88, and reiterated fre-

quently, see, e.g.: *American Trucking Ass'n. v. United States*, 364 U.S. 1, 13-14, that "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based" and that "a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming or less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."

K. As the District Court correctly held, the two-page factual recitation in the Commission's Report included some matters (although the District Court did not specify which ones) which were "trivial to the point of demonstrable irrelevance" and "some innocent conduct, or conduct of ambiguous nature." (R. 121-22) Therefore, inasmuch as the Commission in no way had indicated what weight it had attached to those matters, the District Court was clearly required to remand the case to the Commission for reconsideration and decision without taking into account the matters which the District Court rejected as "trivial", irrelevant, "innocent" or "ambiguous". See *Communist Party v. Subversive Activity Control Board*, 341 U.S. 115; *Curey v. Civil Aeronautics Board*, 275 F.2d 518, 522 (1st Cir. 1960); cf. *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626, 634. By refusing to remand the case on the grounds that the "trivial" and irrelevant items were "imponderable" or "inconsequential" or "a few minor strings at points of less than crucial significance" (R. 121, 122) and that "a reasonable reviewer would not conclude that the deletion of all reference to that conduct would alter or modify the L.C.C.'s ultimate and essential finding" (R. 122), the District Court plainly was, in the words of the *Chenery* case, trying to make "a judicial judgment . . . do service for an administrative judgment."

2. Perhaps because of the lack of necessary basic find-

ings and reasoning in the Commission's Report, the District Court began its discussion of the present case by setting forth, in what it called "a syllabus", the basic facts it deemed most significant. (R. 115-16) However, more than half of the statements in that "syllabus" are demonstrably inconsistent with the facts found by the Commission. The following examples are typical:¹⁴

First, the District Court asserted in the "syllabus" that "if he [Kenneth] had clients other than Nelson Co. they were not shown. Moreover, in his work for Nelson his duties (properly inferable from his title, his rate of compensation, and miscellaneous specific minor incidents,) trench upon administrative or executive rather than strictly independent professional advisory functions." By that single assertion the District Court contradicted (1) the Commission's express finding that Kenneth was "a 'free lance' tariff consultant" (R. 19) — that is, an independent contractor practising a profession which is well established within the transportation industry where the Commission is expert — and (2) undisputed evidence that Kenneth had no "rate of compensation" but rather was paid as independent professionals are normally paid — according to

¹⁴ Some of the other matters as to which the "syllabus" contradicted both the Commission's Report and the undisputed evidence were the following: (1) The "syllabus" "shows a close business relationship between Kenneth A. H. Nelson, his mother, and her six other children" by saying, "Originally they were all associated as shareholders in the Nelson Co." (R. 115) But in fact three of the seven children became shareholders only when "Mrs. Nelson died in 1950 and her stock . . . was devised, 42 shares each". (R. 19, 186-88) (2) The "syllabus" finds, "In 1952 Kenneth was still the owner of 92 of the 500 shares of the Nelson Co." (R. 115), whereas actually Kenneth never owned more than 50 shares of Nelson Co. stock and owned *no* such stock at any time in 1952. (R. 19, 188-94) (3) The statement in the "syllabus" that "At four . . . terminals other than the New York terminal, . . . Gilbertville Co. was a sub-lessee" (R. 116) contradicted the Commission's correct finding that such subleases existed at only three terminals other than New York. (R. 20)

statements for fees which he rendered from time to time. (R. 242-43) Moreover, the District Court's assertion was pure speculation, without any basis in fact. The record contains neither any finding nor even any evidence of "specific minor incidents" while Kenneth was a free lance tariff consultant, or of anything else which might indicate that Kenneth had "duties" or support any logical inference as to such "duties". It is significant, and typical of the vagueness of the District Court's opinion in the present case, that the "syllabus" merely characterizes the "duties" and the District Court does not indicate anywhere in its opinion what "duties" it thought were "inferable".

Second, the District Court in its "syllabus" contradicted the Commission's express finding that Kenneth was a free lance tariff consultant only until "March 1, 1953". (R. 19; see p. 17 and note 8, *supra*) The Commission's finding is never mentioned by the "syllabus", which instead dwells at length upon a few words of ambiguous testimony which obviously were discredited by the Commission¹⁵ to the effect that "some of the services" of Kenneth as a free lance tariff consultant for his client Nelson Co. were performed after Kenneth's acquisition of the stock of Gilbertville Co. (Tr. 427), that is, after March 2, 1953." (R. 116) The District Court then relied upon that testimony to reach an independent conclusion that section 5(4) was vio-

¹⁵ The Commission's refusal to credit these few words was certainly correct: That the witness was only making a guess appears from the words "would have to be" in the very statement the District Court relies upon (R. 361) and also from the witness' admitted lack of knowledge and confusion about the subject. (R. 358-64) Moreover, his guess was based solely upon data concerning Kenneth's annual income. (R. 278-82) Such data cannot support any inference as to when during a year money is received; and the time Kenneth received his fees depended upon when he rendered statements, not upon when he rendered services. (R. 242-43) It is significant that, whereas Kenneth was a free lance tariff consultant for four months in 1951, he received no fees in 1951.

lated: "the whole convergence begins with the purchase of shares in a second company made by an individual at a moment when he is not shown to have severed a relationship to the arterial traffic nerve of the first company." (R. 122).

As has been demonstrated by each of those assertions the District Court squarely contradicted the findings of the Commission. Moreover, those assertions are also inconsistent with the Commission's findings--and clearly erroneous--because they are based upon the District Court's mistaken view of the burden of proof. In each of the instances just cited, as well as elsewhere in the "syllabus",¹⁶ the District Court patently has inferred that because certain things "were not shown" the facts if "shown" would have been harmful to the appellants. See *Interstate Commerce Commission v. J-T Transport Co., Inc.*, 368 U.S. 81, 90. That inference by the District Court is necessarily inconsistent with the facts as the Commission viewed them, for section 7(c) of the Administrative Procedure Act specifies that "the proponent of a rule or order shall have the burden of proof." The Bureau was the proponent in the investigation proceeding, and Commission counsel even conceded that the Commission had the burden of proving that Kenneth did not have other clients (if that had been the fact). (R. 106) Therefore when the Commission viewed the facts it must have drawn the opposite inference--that facts not shown were consistent with the innocence of the appellants.

3. The finding of ultimate fact and the legal theory upon which the District Court based its decision of the issues of

¹⁶ "Some items of expense are shared upon a set formula, not shown to be other than arbitrary." (R. 116) There was no evidence, or even any suggestion, that whatever apportionment the "syllabus" refers to (apparently that of telephone service) was disproportionate, and the Bureau clearly would have had the burden of proving the apportionment questionable.

violation of law were entirely different from those relied upon by the Commission. As has been shown (pp. 14-15, *supra*), the Commission's decision in the present case was based upon an ultimate finding "that Kenneth Nelson was affiliated with Nelson within the meaning of section 5(6) at the time he purchased the stock of Gilbertville" and "the conclusive presumption of section 5(5)". But the District Court specifically disclaimed reliance upon the grounds the Commission had used by stating that its "reasoning does not . . . require resort to any legislatively enacted definitions or presumptions." (R. 123)

The difference between the rationale of the District Court and the rationale of the Commission is fundamental. Section 5(4), read alone, prohibits "control or management in a common interest of any two or more carriers". Whether that prohibition is violated is a question of fact; it is violated only if common control is found by some means or device to have been actually effectuated. Sections 5(5) and 5(6), however, in effect prohibit the acquisition of a carrier by any person who has a "relationship" with another carrier which makes it "reasonable to believe" certain things will happen. In other words, there is a violation by reason of section 5(4) alone if, and only if, certain facts actually exist, whereas there is a violation by reason of sections 5(5) and 5(6) if, and only if, certain things can be predicted.

Although Congress, as a drafting technique, expressed the sections 5(5) and 5(6) prohibition by creating in section 5(5), a conclusive presumption of a section 5(4) violation based on a definition enacted in section 5(6), it can by no means be said that the sections 5(5) and 5(6) prohibition is the same as the section 5(4) prohibition. It certainly may not be lightly assumed that Congress would insert and maintain repetitive sections in the Interstate Commerce Act. Moreover, the legislative history makes it

clear that Congress intended that the two prohibitions be different. Both congressional reports state that the provisions which are now sections 5(5) and 5(6) "are necessary" in addition to what is now section 5(4). S.Rep. 87, 73d Cong., 1st Sess., at 9 (1933); H.R. Rep. 193, 73d Cong., 1st Sess., at 16 (1933). The special counsel for the House Interstate and Foreign Commerce Committee, who was one of the draftsmen of the provisions which are now sections 5(4), 5(5) and 5(6) and was their principal exponent in the hearings, stated that "it is the purpose of subdivision (b) [now section 5(5)] to establish as a rule of law that certain transactions which it might be argued do not come within the provisions of subdivision (a) [now section 5(4)] are to be considered as accomplishing or effectuating control or management in violation of subdivision (a) [now section 5(4)]." A number of examples of transactions which the sections 5(5) and 5(6) prohibition was thought "necessary" to reach were given in the hearings and the House Report. *Hearings on H. R. 9059 Before the House Committee on Interstate and Foreign Commerce*, 72d Cong., 1st Sess., at 32-37 (1932); H. R. Rep. 193, 73d Cong., 1st Sess., at 17 (1933) (See note 10, *supra*).

Contrasting the Commission's decision with that of the District Court in the present case illustrates the fact that the prohibition of sections 5(5) and 5(6) is, as Congress intended it to be, different from the prohibition of section 5(4). The Commission's decision, which was based on violation of the prohibition of sections 5(5) and 5(6), involved the question of ultimate fact whether Kenneth was "affiliated" with Nelson Co. when he purchased the stock of Gilbertville Co. and the issues of basic fact necessary to decide whether as of that time there was a "relationship" between Kenneth and Nelson Co. and whether that "relationship" would have made it "reasonable to believe" that the affairs of any carrier of which Kenneth acquired control would be

managed in the interest of Nelson Co. On the other hand, the District Court's ground of decision involved the question of ultimate fact whether control or management in a common interest had been effectuated and the issues of basic fact implied by that question.⁴⁷ Thus, because the District Court decided the case upon a different ground instead of reviewing the Commission's order upon the grounds . . . upon which the record discloses its action was based in accordance with the principle of the *Cheney* case, the Commission's crucial finding of affiliation was not subjected to judicial review by the District Court.

II. IN DENYING THE APPLICATION FOR APPROVAL OF THE PROPOSED MERGER, THE COMMISSION DISREGARDED MANDATORY CONSIDERATIONS PRESCRIBED BY THE INTERSTATE COMMERCE ACT AND APPLIED INSTEAD A SINGLE ARBITRARY STANDARD.

"The congressional purpose in the sweeping revision of 5 of the Interstate Commerce Act in 1940 . . . was to facilitate merger and consolidation in the national transportation system." *County of Marin v. United States*, 356 U.S. 412, 416. Thus section 5(2)(b) of the Act directs the Commission to approve ("upon the terms and conditions, and with the modifications, . . . found to be just and reasonable") a proposed transaction upon finding that the transaction is within the scope of section 5(2)(a) and "will be consistent with the public interest". The National Transportation Policy declared by Congress (54 Stat. 889 (1940).

⁴⁷ The District Court's *de novo* review is peculiarly repugnant to an orderly administrative process in the present case, for the District Court's "affirmance" of the Commission was on a ground that the Commission itself had implicitly rejected. Division 1 decided the present case on essentially the same theory as that used by the District Court (although on quite different facts). On reconsideration, however, the Commission abandoned that ground and invoked instead the conclusive presumptions of sections 5(5) and 5(6).

p. A-1, *infra*) "is the Commission's guide to the public interest"; *McLean Trucking Co. v. United States*, 321 U.S. 67, 82, and, in addition, Congress prescribed in section 5(2)(c) that the Commission, "in passing upon any proposed transaction under the provisions of" section 5(2), "shall give weight to . . . [certain] considerations, among others".

The Commission, by its decisions, has developed another criterion, usually called "fitness" of the applicants, which it has weighed in considering section 5(2) applications, and in determining "fitness", the Commission has frequently taken into account willful violations of law as evidence of "unfitness". However, as the Commission's Report in the present case stated, "the views *heretofore* followed, [were] that law violations are not necessarily a bar to approval of an application, if the public interest will best be served by approval of the transaction presented." (R. 23) (Emphasis added.) Thus, although a willful violation of law has not infrequently been a factor contributing to the denial of a section 5(2) application by the Commission after weighing "fitness" *together with other criteria*,¹⁸ section 5(2) applications have also been granted by the Commission despite blatant violations of law, e.g., *Otto L. Hankison-Control-Mutual Trucking Co.*, 37 M.C.C. 617 (1941), and such approvals have been affirmed by the courts, e.g., *Baltimore Transfer Co. v. Interstate Commerce Commission*, 114 F.Supp. 558 (D. Md. 1953), *affirmed*, 346 U.S. 890. Moreover, "fitness" of applicants has always been a question of

¹⁸ See, e.g., *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39, 41 (1958) (proposed acquiring carrier's financial condition and effect upon service and traffic interchange weighed); *Powell-Purchase-Rampy*, 57 M.C.C. 597 (1951) (weighing a long history of criminal violations and also considering proposed vendee's unprofitable operations of rights involved under a lease); *Sellers-Control-Huckabee Transport Corp.*, 80 M.C.C. 429 (1959) (considering deterioration of proposed vendor's financial condition while controlled by proposed vendee under temporary authority).

fact involving considerations of good faith and moral character, see, e.g., *Ethel R. Eick Control Royal Blue Coaches, Inc.*, 56 M.C.C. 617 (1950), and applicants have been consistently held "fit" to merge pursuant to section 5(2) despite an innocent violation of section 5(4); e.g., *Masten Transportation, Inc. Merger-Masten Trucking Co., Inc.*, 70 M.C.C. 421 (1957). Although appellants have found no court decision sustaining a denial of a section 5(2) application based on "unfitness" shown by a violation of section 5(4), appellants assume for purposes of the present case both that the Commission may properly consider "fitness" of the applicants as one factor "among others" bearing on whether a section 5(2) application should be granted and that a *willful* violation of law would be evidence relevant to a determination of "fitness."

In the present case the Examiner, in considering the section 5(2) application, weighed "fitness" together with the mandatory considerations of section 5(2)(c). He found that the proposed merger (which is undeniably "within the scope of" section 5(2)(a)) would be in the public interest and would result in a sounder common carrier and achieve substantial savings without adverse effects upon employees or competition, that "a finding of unfitness [of the applicants] by reason of violations is not warranted,"¹⁹ and

¹⁹ The Examiner, who personally observed the applicants both in the hearing room generally and particularly on the witness stand, expressly found that the applicants are not "unfit":

"In the case at bar, there is no evidence of extensive or flagrant violations of either the act or the regulations. The violations shown and the circumstances in which they occurred do not establish a persistent disregard for regulation. Rather, they appear to be the result in some cases of ignorance of the requirements, and in others of a degree of carelessness and not willfulness. The principals are youthful and are of such caliber that their experiences at the hearing herein can be expected to make them more conscious of and responsive to regulation. They earnestly deny that what has been done in respect of Gilbertville and Nelson amounts to effectuation of control in a common interest

that the section 5(2) application should be granted. (R. 70-78)

The Commission did not question the correctness of the Examiner's findings concerning the criteria of section 5(2) (c); instead, the Commission ignored those criteria. Over the protests of one Commissioner who concurred only in the result and at least the two dissenting Commissioners who expressed their opinions (R. 24), the Commission renounced the process of weighing the considerations prescribed by section 5(2)(c) together with "fitness" and other criteria relevant to the public interest, and denied the section 5(2) application solely because a "law violation" had been found. (R. 23) The only statements in the Commission's Report apparently intended to justify the automatic denial of the section 5(2) application because a "law violation" had been found are four sentences which, after restating "the views heretofore followed" (R. 21-23), the Commission quoted and adopted from Division 4's Prior Report. Although the meaning of those four sentences is certainly less than clear, they seem to say that, "after more than 20 years of regulatory experience," "paramount public interest" can no longer warrant granting a section 5(2) application when a "law violation" has been found, and that this "more stringent approach" is designed to vindicate the principles "that a violation of law should not be rewarded [or "blessed" by approval"] and that existing

and on this record their view on that point cannot be said to be wholly groundless." (R. 72-73) (Emphasis added.)

That finding is entitled to great respect. E.g., *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 496. Moreover, it is the only finding of fact with respect to "fitness" in the record.

No "unfitness" can be inferred from the Commission's conclusion of "law violation" in the present case, which was based upon "affiliation" and "the conclusive presumption of section 5(5)". (R. 21; see pp. 14-15, *supra*) The ultimate finding that Kenneth was "affiliated with" Nelson Co. is only a conclusion that it was reasonable to believe certain things would happen, which certainly does not imply any culpable or immoral conduct on the part of Nelson Co. or Gilbertville Co. or anyone else.

carriers endeavoring faithfully to comply with the law should be encouraged and protected."²⁰ In affirming the Commission's decision, the District Court said that the Commission "did no more than to refuse lawful unification to companies which it had found had precipitately and perilously effectuated a prohibited union without permission. Under some imaginable circumstances, to have granted the merger application might conceivably be in the public interest. But to deny application to formalize and strengthen a relationship already in part achieved by unlawful conduct is a clearly proper exercise of a delegated discretionary authority." (R. 126).

But the Commission's decision in the present case was

"The quoted language also remarks, 'It should be emphasized that Nelson's and Gilbertville's principals are not new to transportation or to section 5 proceedings', but the fact that appellants had been involved in previous section 5(2) applications certainly does not reflect adversely on their 'fitness'. The applicants have never denied knowing that a merger would require section 5(2) approval; the merger agreement was expressly conditional upon such approval and recognized the Commission's power to prescribe terms, conditions or modifications pursuant to section 5(2). (R. 170-71) But knowledge that section 5(2) approval would be required for a merger does not mean that the applicants could know that, in the absence of a merger, the Commission would find Kenneth 'affiliated' with Nelson Co. and 'the conclusive presumption of section 5(5)' applicable. A layman cannot be expected to predict sophisticated applications of the complex provisions of sections 5(4), 5(5) and 5(6). As the Examiner said, the applicants' belief that they were innocent of any violation of section 5(4) 'cannot be said to be wholly groundless' and the basis for his finding of a violation 'may not be readily obvious to the layman.' (R. 72-73)

Indeed, if the prior section 5(2) proceedings are relevant, their significance is in the fact that the Commission had ruled on June 16, 1954, in connection with one of the cited proceedings, that "the holding of stock by the stockholders of the L. Nelson & Sons Transportation Co. . . . and by their brother of the controlling stock in Gilbertville Trucking Co., Inc., will not result in the common control of the operations . . . and will not bring about an improper competitive situation." (R. 686-87) In light of that ruling, it certainly may not be inferred that the appellants knew, or even ought to have known, that the Commission would later hold that a violation of law had occurred in March of 1953.

actually quite the contrary of a "clearly proper exercise of a delegated discretionary authority"—it was a *refusal to exercise* the discretion Congress conferred upon the Commission. Congress gave the Commission "discretionary authority" to weigh considerations specified in section 5(2)(c) and other relevant factors and determine whether a section 5(2) application is "consistent with the public interest." By ruling in the present case that no merger, however much in the public interest, will receive section 5(2) approval if there has been a violation of law, the Commission disregarded the fundamental directive of section 5(2)(b) that a proposed transaction shall be approved if "consistent with the public interest",²¹ the four mandatory considerations enumerated in section 5(2)(c) and the National Transportation Policy. Plainly the Commission has no "delegated discretionary authority" thus to ignore express congressional mandates. Rules and principles adopted by the Commission must be "consistent with the statutory standards which govern its action". *Eastern-Central Motor Carriers Assoc. v. United States*, 321 U.S. 194, 211.

That there have been "more than 20 years of regulatory experience in the motor carrier field" does not show obsolescence of section 5(2)(b) or section 5(2)(c) or the National Transportation Policy. Moreover, if any of those provisions were obsolete, it would be for Congress, not the

²¹ There is clearly no basis for equating the fact of a "law violation" with inconsistency with the public interest. See, e.g., *Petition of Knight*, 122 F. Supp. 322 (S.D.N.Y. 1954) (naturalization examiner erred in finding lack of "good moral character" on basis of criminal conviction without considering contents of indictment, plea, verdict and sentence). This Court has long held that the legislature may not create presumptions without a rational basis. See, e.g., *Tot v. United States*, 319 U.S. 463. *A fortiori* an administrative agency must exercise its much more limited discretion in a rational manner. See, e.g., *Secretary of Agriculture v. United States*, 347 U.S. 645, 652-53; *Colorado Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626, 634; cf. *Slochower v. Board of Higher Education*, 350 U.S. 551; *Wieman v. Updegraff*, 344 U.S. 183.

Commission, to change them; meanwhile those provisions are guides which the Commission must follow in considering section 5(2) applications. The Commission clearly erred by ignoring the considerations prescribed by Congress and automatically denying the application because a "law violation" had been found. See *Interstate Commerce Commission v. J-T Transport Company, Inc.*, 368 U.S. 81, 88-90; *National Labor Relations Board v. Insurance Agents' International Union*, 361 U.S. 477, 490; *Truitt Mfg. Co. v. National Labor Relations Board*, 351 U.S. 449, 453; *id.* at 455 (dissenting opinion); *Federal Communications Commission v. RCA Communications, Inc.*, 346 U.S. 86; *Gantty & Tanzola, Inc. v. United States*, 115 F. Supp. 72 (S.D. Cal. 1953).

Moreover, even if the Commission were entitled to disregard sections 5(2)(b) and 5(2)(c), nothing suggested in the Commission's Report or the District Court's opinion could possibly justify the Commission's decision?

The principles announced by the Commission "that a violation of law should not be rewarded" and "should not be 'blessed' by approval" clearly are not meaningful except in the case of a willful violation. However, the Commission's denial of the section 5(2) application was based upon the fact of "law violation", regardless of whether the violation was willful or innocent; indeed, in the present case, even if the Commission could find a "law violation", it certainly could not find a willful violation. (See note 19, *supra*) The Commission's disregard of the distinction between a willful and an innocent "law violation"—a distinction which (as has been shown) was well established in the context of the "fitness" doctrine—was error. Cf. *International Ladies' Garment Workers Union, AFL-CIO v. National Labor Relations Board*, 365 U.S. 731, 740; cases cited note 21, *supra*.

Moreover, the Commission's pre-occupation with keeping

a violation of law from being "rewarded" or "blessed" and the District Court's concern about unification "precipitately . . . effectuated . . . without permission", to the exclusion of all other considerations, are unrealistic. In fact, applicants who have previously violated section 5(4) are not in any better position because of their violation. In no sense is a "fait accompli" presented to the Commission; for example, even if the appellants could be said to be guilty of a section 5(4) violation it is quite clear that no merger has been accomplished. And any approval granted is pursuant to section 5(2)(b), "subject to such terms and conditions and such modification" as the Commission finds just and reasonable.²²

The attitudes expressed by the Commission and the District Court also ignore the fact that all parts of section 5 of the Act were designed to promote the National Transportation Policy, a policy which favors merger and consolidation for the furtherance of the public interest. *County of Marin v. United States*, 356 U.S. 412, 416-18; *Schwabacher v. United States*, 334 U.S. 182, 194 & n. 14; see 54 Stat. 899, p. A-1, *infra*. The particular role of section 5(4) was to forbid mergers which were inconsistent with the National Transportation Policy and the public interest. See *Hearings on H. R. 9059 Before the House Committee on Interstate and Foreign Commerce*, 72d Cong., 1st Sess., at 19-26 (1932). Inasmuch as a merger involving persons

²² Under the provisions of the Federal Aviation Act of 1958, §§ 408 and 409, 72 Stat. 767-68, as amended, 74 Stat. 901 (1960), 49 U.S.C. §§ 1378 and 1379, which are comparable to sections 5(2) and 5(4) of the Interstate Commerce Act, the Civil Aeronautics Board has carefully avoided adopting a rule of automatic disqualification because of effectuation of unauthorized joint control in violation of law, although it will refuse to consider an application until the applicants have purged themselves of any unlawful relationships. See *Charles C. Sherman*, 15 C.A.B. 876 (1952); cf. *Atlas Corporation*, 21 C.A.B. 425 (1955).

who have previously violated section 5(4) or even a merger prematurely carried out may nevertheless be in the public interest and desirable to promote the National Transportation Policy, it is obvious that undue emphasis on a prior "law violation" or on "precipitate" effectuation is contrary to the intent of Congress. Regardless of whether automatic denial of a section 5(2) application because of a "law violation" is said to be "a penalty to these particular respondents" or a device to encourage and protect "existing carriers endeavoring faithfully to comply with the law" (R. 23), such a denial is clearly inappropriate, for it tends to defeat the overall policy of section 5 and it subjects the persons who are held to have violated section 5(4) "to disabilities not intended by Congress as a result of" such a violation. *National Labor Relations Board v. District 50, United Mine Workers*, 355 U.S. 453, 463.

III.° ALTHOUGH THE COMMISSION INSERTED A REQUIREMENT OF DIVESTITURE IN ITS ORDER, THERE IS NO INDICATION THAT THE COMMISSION EXERCISED DISCRETION WITH RESPECT TO THAT REQUIREMENT.

After rejecting the Examiner's recommendation that appellants' section 5(2) application be approved, Division 4 issued an order directing appellants "to terminate the violation of the provisions of section 5(4) of the Interstate Commerce Act" (R. 94); the Commission not only adopted *verbatim* all of the operative paragraphs of Division 4's order but it also added a new, additional paragraph directing appellants "to divest themselves of any and all interest which they may have in the capital stock of Gilbertville Trucking Co., Inc." (R. 26).

Whether a divestiture order should be entered had never been argued or considered as an issue in the case, and

nothing in the Examiner's Report or Division 4's Prior Report even suggested the possibility of such a drastic remedy. Yet the Commission's Report did not state any findings or reasoning with respect to the requirement of divestiture or in any way attempt to justify or explain that requirement. Indeed, the Report concludes simply, in the same words Division 4 used when it did *not* require divestiture; "An appropriate order, which will deny the application and require the respondents named above to terminate the violation of section 5(4) of the act, will be entered." (R. 24, 93) Nothing in the Commission's Report even hints that its order includes a requirement of divestiture.

The Commission's remedial power is granted by section 5(7) of the Interstate Commerce Act, which empowers the Commission "by order [to] require such person [found to be violating section 5(4)] to take such action as may be *necessary*, in the opinion of the Commission, *to prevent continuance* of such violation." Undoubtedly that grant of power is broad enough to authorize issuance of a divestiture order in an appropriate case. But mere power is not sufficient to sustain an order of the Commission. Section 5(7) not only confers upon the Commission discretion to determine what order is "necessary, in the opinion of the Commission," but, as the word "opinion" indicates, it also charges the Commission with the concomitant responsibility of exercising that discretion. "[T]he power with which Congress invested the [Commission] . . . implies responsibility—the responsibility of exercising its judgment in employing the statutory powers." *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 194; see, e.g., *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 613.²³

²³ The requirement that an administrative agency must use its power pursuant to a responsible exercise of judgment is implicit in this Court's

Moreover, what "action" is "necessary" to prevent continuance of such violation" is clearly one of the "material issues of fact, law, or discretion presented on the record" with respect to which section 8(b) of the Administrative Procedure Act requires "a statement of (1) findings and conclusions, as well as the reasons or basis therefor." See pp. 13-14, *supra* and cases there cited. Even before the enactment of the Administrative Procedure Act, this Court required that an administrative agency, in exercising its discretion, "disclose the basis of its order . . . [and] give clear indication that it has exercised the discretion with which Congress has empowered it." *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 197. The requirement that an administrative agency "disclose the basis of its order" is fundamental to our legal system, for only such disclosure makes meaningful judicial review possible and ensures that an agency to which Congress grants discretion will not seize absolute and unlimited power. *Eastern-Central Motor Carriers Assoc. v. United States*, 321 U.S. 194, 209; *Panama Refining Co. v. Ryan*, 293 U.S. 388, 431; *Saginaw Broadcasting Co. v. Federal Communications Commission*, 96 F.2d 554 (D. C. Cir. 1933), *cert. denied*, 305 U.S. 613; Landis, *The Administrative Process* 98

repeated refusal to enforce exceptionally broad cease and desist orders unless warranted by the special circumstances of the case. See *Federal Trade Commission v. Henry Broch & Co.*, 368 U.S. 360, 367-68; *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426. As Federal Trade Commissioner Elman has said, "Since the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist . . . the 'reasonable relation' of the order to the facts should be shown." *Vanity Fair Paper Mills, Inc.*, 3 CCH Trade Reg. Rep. Par. 15,796, p. 20,612 (dissenting opinion).

²⁴ "Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty." *New York v. United States*, 342 U.S. 882, at 884 (Douglas, J. dissenting).

(1938); cf. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 Harv. L. Rev. 904 (1962). Forcing an agency to articulate the basis of its decision also promotes sound administrative decision-making by preventing the agency from leaping to conclusions, such as the divestiture order in the present case, which prove erroneous when an attempt is made to formulate "reasons or basis therefor." *United States v. Forness*, 125 F.2d 928, 942 (2d Cir. 1942), cert. denied sub. nom. *Salamanca v. United States*, 316 U.S. 694; Landis, *The Administrative Process* 105-06 (1938).²⁵

When the remedy ordered by the agency is a particularly drastic one, correspondingly it is particularly important that the agency have carefully explored (and given "clear indication" that it has explored) possible alternatives, so that, if some other effective remedy is available which would inflict less harm upon the addressees of the order, that alternative may be discovered and unnecessary harm may be avoided. See *Timken Roller Bearing Co. v. United States*, 344 U.S. 593, 602-03; *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 613; cf. *Local 60, United Brotherhood of Carpenters & Joiners v. National Labor Relations Board*, 365 U.S. 651. Thus, in the *Jacob Siegel* case, this Court remanded the case to the Federal Trade Commission for a determination as to whether the absolute prohibition of the use of a trademark ordered by the FTC was necessary to achieve effective termination of a misbranding violation. The Court held that complete excision

²⁵ "Any judge can testify to the experience of working on opinions that won't write with the result that his conclusions are changed because of his inability to state to his satisfaction the reasons upon which they depend. Delegation of opinion writing has the danger of forcing a cavalier treatment of a record in order to support a conclusion reached only upon a superficial examination of that record. General impressions rather than that tightness that derives from the articulation of reasons may thus govern the trend of administrative adjudication." Landis, *supra* at 106.

of the name from the respondent's brands should be ordered only if there was no alternative available, but, because the Commission failed to indicate that it had exercised its discretion,

"we are left in the dark whether some [less drastic remedy] . . . would in the judgment of the Commission be adequate." (327 U.S. at 613)

As this Court has frequently recognized, see, e.g., *United States v. E. I. duPont de Nemours & Co.*, 306 U.S. 316, 326, a divestiture order is among the most drastic of remedies. The brutal impact of the Commission's order in the present case on Kenneth, the sole stockholder of Gilbertville Co., is undeniable. The divestiture order would require him to give up the entirety of his interest in the company to which he has devoted the last nine and one-half years of his life and which he has developed into a successful and vigorous trucking company. (See R. 51, 116.) It is evident that, upon a forced sale pursuant to the Commission's order, Kenneth would not receive even approximately a fair price, if there is any market at all for such a motor carrier. On the facts of this case, application of the remedy of divestiture, which is inherently drastic, would be peculiarly harsh and inappropriate.

This Court has repeatedly ruled that a divestiture order should be included in a decree only where absolutely necessary. See *United States v. E. I. duPont de Nemours & Co.*, 306 U.S. 316, 327; *Hughes v. United States*, 342 U.S. 353; *Hartford-Empire Co. v. United States*, 323 U.S. 386, 412-14; *United States v. Reading Co.*, 253 U.S. 26, 64; *United States v. Lehigh Valley R.R.*, 254 U.S. 255, 270. See also United States Attorney General's Committee, *Study of the Anti-trust Laws* 353-55 (1955). And the harshness of divestiture has often led this Court to qualify or withhold this drastic

remedy. For example, in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 602-03, the majority of the Court held:

"Since divestiture is a remedy to restore competition and not to punish those who restrain trade, it is not to be used indiscriminately, without regard to the type of violation or whether other effective methods, less harsh, are available. That judicial restraint should follow such lines is exemplified by our recent rulings in *United States v. National Lead Co.*, 332 U.S. 319, where we approved divestiture of some properties belonging to the conspirators and denied it as to others, pp. 348-353. While the decree here does not call for confiscation, it does call for divestiture. I think that requirement is unnecessary."

See *United States v. National Lead Co.*, 332 U.S. 319, 351; *Hartford Empire Co. v. United States*, 323 U.S. 386, 426; *Continental Insurance Co. v. United States*, 259 U.S. 156, 170 (dictum); cf. *United States v. American Tobacco Co.*, 221 U.S. 106, 185-87.

In the present case, the District Court attempted to excuse the Commission's failure to state the required finding as to necessity and "the reasons or basis therefor" by ruling that as a matter of law in any case involving an unlawful acquisition of control a divestiture order may be entered without regard to other circumstances²⁶ and sought

²⁶ Even if the novel rule of law essayed by the District Court were sound, such subsequent rationalization by a reviewing court cannot be an adequate substitute for the statement of findings and "reasons or basis therefor" which the Commission was required to make. Congress vested discretion in the Commission to order action "necessary, in the opinion of the Commission"—not action "necessary in the opinion of the District Court. Thus the important question is whether, and how and why, that discretion was exercised by the Commission.

support for that ruling in this Court's recent decision in the *duPont* case. But the *duPont* case does not support either the Commission's action or the District Court's rationalization. Neither that case, nor the long line of anti-trust decisions involving divestiture which it followed, justified an absolute rule of divestiture without regard for necessity, even in the context of restoring healthy competitive conditions required by the antitrust laws. In the *duPont* case this Court ruled only that divestiture should be imposed "if the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief." (366 U.S. at 327) This Court recognized that "hardship can influence choice . . . among two or more effective remedies" (*ibid.*), not only by saying so, but also by considering at great length the very question the Commission ignored in the present case—whether divestiture was necessary. (366 U.S. at 334-344).²⁷

Moreover, because the Interstate Commerce Commission is required to consider the National Transportation Policy in administering the Act, *Schwabacher v. United States*, 334 U.S. 182, 191-94, the factors governing a court's decision as to whether a divestiture order is necessary in an anti-trust case are substantially different from those the Commission must consider pursuant to Section 5(7). The fact that the antitrust laws are intended to break up monopolistic structures in order to restore competitive conditions has typically been the basis of decisions that decrees of divestiture or dissolution are necessary in anti-trust cases.²⁸

²⁷ Traditionally defendants against whom a decree of divestiture might be entered have been given full opportunity to be heard on the question of the decree. See, e.g., *United States v. American Tobacco Co.*, 221 U.S. 106 185; *United States v. Minnesota Mining & Mfg. Co.*, 96 F. Supp. 356 (D. Mass. 1952), modifying decree issued following discussion in 92 F. Supp. 947, 966 (1950).

²⁸ *Schine Theatres v. United States*, 334 U.S. 110, 128 20; *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 77-78; *Adams*,

In contrast, antitrust considerations have been relegated to a minor role in section 5 of the Interstate Commerce Act, which is designed primarily to promote the National Transportation Policy and accomplish the creation of a strong national transportation system. See *McLean Trucking Co. v. United States* 321 U.S. 67, 83; Levi, "Section 7 of the Clayton Act—Regulated Industries," *How To Comply with the Antitrust Laws* 136, 147 (1959 CCH Antitrust Symposium). Whereas the congressional policy of promoting and encouraging mergers and consolidations of carriers is of long standing and persists in the present statute,²⁹ Congress has at the same time been very wary about divestiture in the transportation field.³⁰ Divestiture, as such, has never been expressly sanctioned by Congress in the context of section 5. Even the much more limited remedy of cancellation of voting rights won congressional approval only for the limited purpose of protecting the consolidation

Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust, 27 Ind. L.J. 1, 4 (1951); Timberg, *Some Justifications for Divestiture*, 19 Geo. Wash. L. Rev. 132, 136 (1950). This Court described the statute involved in the *duPont* case as "narrowly directed" to outlawing "a particular form of economic control—stock acquisitions which tend to create a monopoly of any line of commerce" (366 U.S. at 329).

²⁹ H.R. Rep. No. 456, 66th Cong., 1st Sess., at 6, 18 (1919); H.R. Rep. 650, 66th Cong., 2d Sess., at 63 (1920); S. Rep. No. 87, 73rd Cong., 1st Sess. (1933); H.R. Rep. 193, 73d Cong., 1st Sess., at 16 (1933); H.R. Rep. No. 1217, 76th Cong., 1st Sess., at 6 (1939); S. Rep. No. 433, 76th Cong., 1st Sess., at 28 (1939); H.R. Rep. No. 2016, 76th Cong., 3d Sess., at 61 (1940); see *County of Marin v. United States*, 356 U.S. 412, 416-18; *Schwabacker v. United States*, 334 U.S. 182, 192-94; *Escanaba & Lake Superior R.R. v. United States*, 303 U.S. 315, 320; Levi, "Section 7 of the Clayton Act—Regulated Industries," *How to Comply With the Antitrust Laws* 136, 146-47 (1959 CCH Antitrust Symposium).

³⁰ Even the proposal that the Commission have power to order divestiture in special cases where control of a carrier tended to defeat the national consolidation plan, see *Hearings on H.R. 9059 Before House Committee on Interstate and Foreign Commerce*, 72d Cong., 1st Sess., at 19, 36 (1932), was weakened so as merely to provide for divestiture of voting power, see H.R. Rep. No. 193, 73d Cong., 1st Sess., at 23, 24 (1933).

plan which the Commission was at one time directed to adopt and was promptly repealed when the consolidation plan was abandoned as a specific means of effectuating Congress's policy. See S. Rep. No. 433, 76th Cong., 1st Sess., at 31 (1939).

Divestiture is essentially an equitable remedy, *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316, 326, and it is an inherent characteristic of equitable relief that it adapts itself to the particular needs and the particular facts of a given case. See *Brown v. Board of Education of Topeka, Kansas*, 349 U.S. 294, 300; *Pope v. Equity Jurisprudence*, 109 (5th ed. 1941).

"The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Company v. Bowles*, 321 U.S. 324, 329-30; see *United States v. W. T. Grant Co.*, 345 U.S. 629, 632.³¹

In formulating remedial orders, the Commission is in a position analogous to a court of equity; see Landis, *The Administrative Process* 96 (1938); cf. *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426, 433, 436, and is clearly required to exercise a comparable dis-

³¹ The fact that the Commission's order was being issued more than six years after the time of the violation found by the Commission ("the time he [Kenneth] purchased the stock of Gilbertville" (R. 21)) should also have been a factor considered by the Commission in selecting an appropriate remedial order. Cf. *United States v. United Shoe Machinery Co.*, 247 U.S. 32, 45-46. This Court has recently recognized the inappropriateness of basing a remedial order on a stale record. *United States v. Borden Co.*, 370 U.S. 460, 471-72.

cretion in considering all relevant factors and shaping its orders to the circumstances of the particular case.

There were two conditions precedent to the Commission's authority to require Kenneth to divest himself of the stock of Gilbertville Co.: *first*, the Commission, by a meaningful exercise of discretion, considering all the circumstances of the present case and considering other available remedies which might be effective, had to determine that the requirement of divestiture was "necessary . . . to prevent continuance of such violation"; and, *second*, the Commission had to state, in the form of findings and "the reasons or basis therefor," not only *that* divestiture was necessary, but also *why* it was. In light of the well-established congressional policies embodied in section 6, and the National Transportation Policy and of the flexibility with which the Commission may formulate its decrees, it seems clear that a number of effective alternative remedies must have been available to the Commission in the present case.³² Therefore it seems unlikely that the harsh divestiture order could have been found "necessary", which in turn suggests that

³² For example, inasmuch as the Commission's finding that Kenneth was "affiliated" with Nelson Co., which was the basis of the Commission's finding of a violation, implies that the Commission found some unidentified "relationship" (see pp. 14-16, *supra*), an order directed to severing that "relationship" would appear to be a completely satisfactory and effective way of terminating the supposed violation. Such an order would not involve the hardship inherent in the Commission's order that Kenneth sell the stock of Gilbertville Co. and seems much more logical than ordering Kenneth to sever his relationship with Gilbertville Co., with which he is completely identified as sole stockholder, principal officer and director. Because the violation the Commission found was, essentially, that Kenneth was "affiliated"—or linked—with both Gilbertville Co. and Nelson Co., it would seem elementary that breaking either link would break the chain. A meaningful exercise of discretion, it would seem, might be expected to have resulted in an order directed to the accomplishment of the less harsh of the two possible severances, or perhaps an order giving Kenneth a choice between the two. See, e.g., *Hartford-Empire Co. v. United States*, 323 U.S. 336, 426; *United States v. Crescent Amusement Co.*, 323 U.S. 173, 188-89.

the Commission's divestiture order was not the result of any meaningful exercise of discretion. But, regardless of whether or not the Commission in fact exercised discretion, the Commission unquestionably failed to state either the required finding or the required reasons or basis or in any other way to give a "clear indication" that it had exercised discretion, and that failure clearly constitutes reversible error.

IV. THE DISTRICT COURT DID NOT AND COULD NOT FIND THE COMMISSION'S DECISION OR ITS FINDINGS SUPPORTED BY SUBSTANTIAL EVIDENCE.

This Court has held that "substantial evidence" on the whole record" must be "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 229. Accordingly, it must do more than create a suspicion of the existence of the fact to be established. *Labor Board v. Columbia Enameling & Stamping Co.*, 306 U.S. 292, 300. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 477. However, when appellants argued to the District Court that neither the Commission's decision in the present case nor a number of its findings met these tests, the District Court merely quoted from defendants-appellees' brief "the essential portion of the text" of the Commission's Report, "with the supporting transcript references conveniently supplied by defendants" and concluded "that the statements of the L.C.C. are supported by evidence." (R. 115, 121; see R. 117-20). Plainly the District Court's holding that the Commission's findings were supported by "evidence", rather than "substantial evidence" was an error of substance, not merely one of semantics, for the District Court, in its reliance upon the "evidence" cited by appel-

lees' brief, neglected to "take into account whatever in the record fairly detracts from its weight." (340 U.S. at 488).

Most of the facts recited by the Commission's Report are so obviously innocent and irrelevant that no argument is necessary to show that those findings, even though in many respects they are unclear or inaccurate,³³ cannot sustain the Commission's decision. One series of statements in the Report (R. 20-21), however, contains such ambiguous, exaggerated and baseless language that it merits brief comment.

(a) The statement that Gilbertville Co. "constantly . . . leases from a pool of equipment maintained by Nelson" (R. 20) is a distortion of the facts. Nelson Co. frequently had much idle equipment not because it "maintained" a "pool", but because Nelson Co.'s operating authority (R. 144-45) made its business primarily dependent upon a "particular line of specialized commodities, namely, textiles, . . . [which] has a very, very wide fluctuation of usage of equipment" (R. 432) and which had been moving southward out of New England (R. 394-95). Nor did Gilbertville Co. depend upon any such "pool". Gilbertville Co., buying on conditional sale (R. 377-79), increased and upgraded its vehicle inventory as rapidly as it could (R. 458), and by the end of July 1956 owned thirty-five vehicles, including twenty-three made in 1955 or 1956 (R. 349, 447-49, 672), but, because it was continually hampered by lack of working capital and consequent poor credit (R. 218-20, 337, 340-43, 457-58), Gilbertville Co. could not buy enough vehicles

³³ For example, the Report fails to state that the Bergson Company, an outgrowth of the estate of Mrs. Linnea Nelson, owns substantial amounts of real estate in addition to the terminals mentioned (R. 368, 70, 385). And it does not mention that the carrier which leases the New York City terminal to Nelson Co. also shares in its use or that Blue Line Express is another tenant in common of the Woonsocket, R.I. terminal and of the telephone there. (R. 414-17, 437-38).

for its rapidly expanding business.³⁴ Gilbertville Co. thus was frequently forced to lease equipment from Nelson Co. and two other companies (R. 483, 485, 487) under written leases accompanied by the inspection reports required by Commission regulations. (R. 513-14, 623-24) Moreover, except that the only vehicles (if any) available for Gilbertville Co. to lease from Nelson Co. on any given day (if Gilbertville Co. needed to lease them) were those (if any) which were left after Nelson Co. had satisfied all of its needs (R. 413, 430, 433-34), there was no correlation between the number of vehicles leased by Gilbertville Co. on any given day (which varied from 0 to 6) (R. 413, 482, 516) and the number of Nelson Co. vehicles standing idle (which varied from 0 to 40). (R. 433).

(b) The "same group of drivers" which "both draw upon" (R. 20) was nothing more than the "spare" drivers in the particular area (R. 516) — that is, men at the bottom of the union seniority list, who made their living going from company to company and might well work for five carriers in five days (R. 510, 532).³⁵ Nelson Co. considered 79 drivers as its employees and Gilbertville Co. so considered 53 drivers. (R. 391, 456) But the practice in the

³⁴ The business of Gilbertville Co., which in March of 1938 had eighty-eight vehicles and a large capital deficit (R. 212, 219), "flourished under the direction and ownership of Kenneth" (R. 116); Gilbertville Co.'s average monthly operating revenue for January through July of 1956 was more than ten times what it had been in 1953. (R. 51).

³⁵ Thus a few drivers who worked for Gilbertville Co. appeared on the union seniority list for Nelson Co. (R. 548), doctor's certificates for a number of drivers who worked for Nelson Co. were kept on file by Gilbertville Co. (R. 578), and some drivers who worked for Nelson Co. (presumably the more senior ones) had not worked for Gilbertville Co., whereas other drivers had worked for both Nelson Co. and Gilbertville Co. (R. 612). The Commission investigators never checked the drivers named on the seniority list or the doctor's certificates against employment records of other motor carriers. (R. 581-86, 638)

industry was that men were told not to report to work when there was no work for them. (R. 524) and when extra men were needed they would be hired (regardless of for what other carriers they might previously have worked), either from a list of spare men or through the union hiring hall (R. 514, 516, 517).

(c) In general, the small percentage of shipments which Nelson Co. and Gilbertville Co. interlined with each other³⁶ were handled like all interline shipments. (R. 397-98. That Nelson did all of the billing on shipments interlined with Gilbertville was certainly not unique, for Nelson did all billing on shipments it interlined with a carrier in Pennsylvania (Showalter) and on certain other shipments as well. (R. 435-37). Fixed percentage divisions of interline revenue were used by many other motor carriers (R. 640-41) and had been established by Gilbertville Co. with three carriers other than Nelson Co. (R. 451-52, 472-73) and by Nelson Co. with Showalter (R. 435-37).³⁷ As the testimony just cited showed, such a fixed percentage was simply a means of greatly simplifying the calculation of shares of revenue on an interlined shipment by establishing a stabilized figure, which, based on experience, could be expected over a period of time to give each carrier the same revenue it would get by strict mileage pro-ration of each shipment.

(d) The industry practice whereby a "spare" driver

³⁶ Only two to three per cent of the shipments carried by Nelson Co. involved an interline with Gilbertville Co. (R. 399) and Nelson Co. also interlined with 15 to 20 other carriers, including some 6 competitors of Gilbertville Co. (R. 395-96, 442-43). Gilbertville Co. interlined with about 50 carriers, and interlines with Nelson represented only about five per cent of the shipments it carried. (R. 450)

³⁷ Although Inspector LaCour "would regard the 60-40 arrangement as an unusual one," as the Examiner observed, "that doesn't make it so unusual." (R. 619) And the same Inspector LaCour contended, in connection with an attempt to prove that Gilbertville Co. had failed to observe a gateway, that "no part of the Town of Palmer, Mass. is within 10 miles of . . . Route 83" (R. 614), although, as counsel later stipulated, the distance is really less than 9 miles (R. 665-66).

with low seniority might "be employed by both companies [and perhaps three others] during the same pay period" has been referred to in paragraph (b), *supra*. It is clear that no driver worked for more than one carrier at the same time. (R. 611)

(c) The Commission's assertion that "on those occasions where a shipment moves from a point in the territory of one to a point in the territory of the other the same driver and vehicle will perform the through movement" was not supported by substantial evidence. Gilbertville Co. and Nelson Co., in connection with interlining of truckload shipments, did interchange trailers.³⁸ But they normally did not interchange when the shipment involved was less-than truckload. (R. 452, 463-65, 465-69, 494-97). Moreover, the same driver did not "perform the through movement" (R. 352, 510, 515), and, if the motive power ever went through, it was by coincidence rather than design. (R. 495-97) The only thing in the record which even tends to support the Commission's statement is something that Commission Investigator Shea says was told to him by one Mr. Kashady (R. 661-62) which, in light of the proven unreliability of other things Mr. Shea said Mr. Kashady said in the same conversation,³⁹ is plainly not substantial evidence.

(f) It seems too obvious for argument that there can be

³⁸ Although interchange of equipment technically involves mutual leases, it is a concept entirely different from leasing (R. 412-13, 497), and involves an exchange by carriers (on a one-for-one basis) of equipment laden with freight to be interlined for comparable equipment either empty or laden with other freight being interlined in the opposite direction. Interchange was a common (R. 405) and clearly lawful industry practice, see, e.g., *Railway Labor Executives' Association v. United States*, 151 F. Supp. 108 (D.D.C. 1957); *Huff Transfer, Inc. v. United States*, 105 F. Supp. 851 (D.W. Va. 1952) (absence of interchange cited as one reason for disapproving merger application).

³⁹ For example, Mr. Shea first said that Mr. Kashady said that Gilbertville Co.'s stock records and accounting records were at Ellington (R. 550-57, see R. 665), but he later said that Mr. Kashady said he did not know where such records were (R. 660).

nothing unlawful in the fact that Gilbertville Co. and Nelson Co. obtain "accounting and financial advice" as two of "a few hundred" (R. 286) clients of an independent public accountant (R. 184, 199, 223, 224, 244).

(g) The Commission's assertion "each operates to some extent, at least, under managerial direction from officers of the other", according to Commission counsel's citations which the District Court adopted, is supported by certain testimony of Messrs. Shea and LaCour. (R. 529-34, 537-38, 616-18) All that is relevant in the cited testimony is (1) that Kenneth operated a teletype machine and answered telephone calls—scarcely activities of "managerial direction", (2) that Kenneth "instructed" a Nelson Co. employee named Seiferth "to bring a certain vehicle up to the office" and "then told him to take it back down again" (R. 530, 532, and (3) that Mr. Shea thought he saw Kenneth "issuing instructions, three times in our presence, to Mrs. Marjorie Edwards, whom we later found was in charge of the L. Nelson & Sons Co. office." (R. 533) On cross-examination Mr. Shea admitted that he did not know what Kenneth and Mrs. Edwards had talked about; "simply she would ask him a question; he would give her an answer." (R. 582) Of course, it was perfectly natural and proper for Kenneth (on behalf of Gilbertville Co.) to talk to Nelson Co. (represented by Mrs. Edwards) in connection with interlined shipments, leases of equipment or other matters of business between the two carriers, or to ask Mr. Seiferth to bring around for Kenneth to see a truck which Gilbertville Co. was going to lease, or to send a teletype message or talk on the telephone. And it does not appear that Messrs. Shea and LaCour saw anything other than such activities. Moreover, nothing in the cited testimony even remotely suggests any "managerial direction" of Gilbertville Co. by any officer of Nelson Co. The Commission's statement with respect to "managerial direction" is not based on substan-

Real evidence, but just on suspicions—suspicions like those underlying the argument, rejected in *Brann v. Western Massachusetts Theatres, Inc.*, 288 F.2d 302, 305 (1st Cir. 1961), that “if everyone acts alike it shows conspiracy but if they act differently it merely means concealment.”

(c) The statement that “they are liberal with each other in settlement of intercompany accounts” (R. 21) is based solely on Mr. LaCour’s statement that as of November 5, 1955, “in round figures” Nelson Co. owed Gilbertville Co. approximately \$39,000 on account of interline settlements and Gilbertville Co. owed Nelson Co. roughly \$19,000 for equipment rental (R. 622). But those figures are meaningless, for they do not indicate how much was due to or receivable by either corporation on account of other items. Inasmuch as substantial amounts became due monthly from Gilbertville Co. to Nelson Co. on account of rent and such items (R. 517-21) and Mr. LaCour admitted on cross-examination that he had not covered the complete account between the two companies (R. 641-43), it is perfectly possible that the balance of account might have been even to the last penny. Indeed, in August 1956, Nelson Co. owed Gilbertville Co. nothing and Gilbertville Co. owed Nelson Co. only some \$1,400 for charges incurred in July 1956. (R. 352, 370-71)

(1) There was no substantial evidence that traffic was commingled by the companies “whenever it suits their convenience.” (R. 21) The evidence did show that three Nelson Co. vehicles (one inspected May 12, 1955 (R. 588) and two inspected May 2, 1956 (R. 565-71, 574-76)) were criticized for each carrying one small shipment (respectively 85, 270, and 158 pounds) apparently covered by a Gilbertville Co. “pro”, and that a Gilbertville Co. vehicle, also inspected on May 2, 1956, was criticized for carrying a shipment of greased wool apparently moving on a Nelson “pro” (R. 627-34). However, the evidence also shows that

the Commission had conducted repeated checks extending over a period of at least a year and a half (see R. 616), and had inspected many other vehicles of Gilbertville Co. and Nelson Co., both during the three-day effort of which the May 2, 1956 check was a part (R. 594-604, 645-49), and at other times (R. 604-06, 650), and no other evidence of such "commingled" traffic was found. Four criticisms resulting from so many checks do not constitute substantial evidence that commingling of traffic was either willful or "whenever it suits their convenience", particularly in light of the small size of the shipments improperly on the Nelson Co. vehicles and the fact that three of the four incidents occurred on a single day when the principal officers of the companies were apparently out of town. (R. 649-50) The only finding which could be supported by the evidence was a finding, like that the Examiner made, that "there is no evidence of extensive or flagrant violations of either the act or the regulations. The violations shown . . . appear to be the result in some cases of ignorance of the requirements, and in others of a degree of carelessness and not willfulness." (R. 72)

CONCLUSION

For the reasons stated, appellants respectfully submit that the judgment of the District Court should be reversed.

Respectfully submitted,

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APPENDIX A

National Transportation Policy.

54 Stat. 899 (1940).

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Interstate Commerce Act, 50 Stat. as amended,

54 Stat. 995 (1940), as

amended, 63 Stat. 485 (1949).

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers

jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise;

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e))₂ and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided, That* if a carrier by railroad sub-

ject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion or failure to include other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

*Interstate Commerce Act, § 5(1), as
amended, 54 Stat. 902 (1940).*

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and para-

graph (5), the words "control or management" shall be construed to include the power to exercise control or management.

*Interstate Commerce Act 5(5), as
amended, 54 Stat. 907 (1940):*

(5) For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

*Interstate Commerce Act 5(6), as
amended, 54 Stat. 908 (1940):*

(6) For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any

other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

Interstate Commerce Act, 507, as

amended, 54 Stat. 503 (1940).

(7) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this part, and with respect to any violation of paragraphs (2) to (12) inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to the part shall apply to such a violation by any other person.

Administrative Procedure Act, 500,

60 Stat. 271 (1946).

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed on rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party, and as supported by and in accordance with the reliable probative, and substantial evidence.

*Administrative Procedure Act (8(b)).**60 Stat. 242 (1946).*

(b) **SUBMITTALS AND DECISIONS.**—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers, the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decision (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusion. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

*Administrative Procedure Act (10(c)).**60 Stat. 243 (1946).*

(c) **SCOPE OF REVIEW.**—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required

by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to a trial de novo by the reviewing court. In making the foregoing determinations the courts shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 40

GILBERTVILLE TRUCKING CO., INC., THE L. NELSON &
SONS TRANSPORTATION COMPANY, ET AL., APPEL-
LANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLEES

OPINIONS BELOW

The opinion of the district court is reported at 196 F. Supp. 351 (R. 108-126; J.S. App. 2-23). The opinion of the Interstate Commerce Commission (R. 11-24; Motion App. 17b-33b) is reported at 80 M.C.C. 257; the opinion of Division 4 (R. 81-93; Motion App. 1b-16b) is reported at 75 M.C.C. 45; the opinion of the Examiner (R. 30-80; J.S. App. 24-81) is unreported.

JURISDICTION

The judgment of the district court was entered on July 18, 1961. A timely notice of appeal was filed

on September 11, 1961, and this Court noted probable jurisdiction on February 19, 1962 (R. 688). The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b). See *McLean Trucking Co. v. United States*, 321 U.S. 67.

QUESTIONS PRESENTED

1. Whether the Commission's finding that appellants violated Section 5(4) of the Interstate Commerce Act by the unlawful common control of Nelson Co. and Gilbertville Co., was supported by adequate subsidiary findings and substantial evidence.

2. Whether the decision of the district court, upholding the Commission's finding of violation of Section 5(4), was vitiated by alleged differences between the factual statements and rationale of the court and Commission.

3. Whether, after finding the stated violation of Section 5(4), the Commission acted within its statutory discretion,

(a) in denying appellants' application to merge Nelson Co. and Gilbertville Co.;

(b) in directing appellants to divest themselves of their interests in Gilbertville Co.

STATUTES INVOLVED

The relevant portions of the National Transportation Policy, 54 Stat. 899, and of Sections 1 and 5 of the Interstate Commerce Act, as amended, 49 U.S.C. 1, 5, are set forth in the appendix, *infra*, pp. 61-66.

STATEMENT

This is a direct appeal from a final judgment entered on July 18, 1961, by a three-judge district

court dismissing appellants' suit to set aside orders of the Interstate Commerce Commission. Under Section 5 of the Interstate Commerce Act, 49 U.S.C. 5, the Commission denied an application to merge the Nelson and Gilbertville Cos. and directed appellants to divest themselves of their interests in Gilbertville Trucking Co. The following statement is based on facts found by the hearing examiner. Both the full Commission and its Division 4¹ pointed out that these findings of fact were not challenged by appellants (R. 19, 85, 89).

A. THE MERGING COMPANIES

1. Appellant L. Nelson & Sons Transportation Company ("Nelson Co.") is a common carrier by motor vehicle, authorized by the Commission to transport specified commodities associated with the manufacture of cloth by irregular routes between certain points in New England and between certain other points in New England, New York, New Jersey and Pennsylvania (R. 39-40). It was organized in 1930 as a partnership of Mrs. Nelson and two of her seven children—Oscar and Charles Chilberg (R. 36-37, 387).² After the incorporation of Nelson Co. in 1948,

¹ Pursuant to Section 17(2) of the Act, the Commission has delegated to one of its divisions the responsibility for deciding all matters dealing with mergers and acquisitions of control arising under Section 5 of the Act. Up to March 6, 1961, the responsible division was designated Division 4, since that time Division 3. 26 Fed. Reg. 1961; 1967.

² Mrs. Nelson had married twice and her seven children were Charles C. Chilberg, Oscar H. Chilberg, Howard Chilberg, Kenneth A. H. Nelson, Clifford J. O. Nelson and two daughters, Greta C. Nelson Carlson and Ruth Nelson Widham Nyberg (R. 36).

stock ownership was divided among Mrs. Nelson and four sons—Charles and Oscar Chilberg and their half-brothers, Clifford and Kenneth Nelson. Mrs. Nelson served as president and treasurer, Oscar Chilberg as vice-president, Kenneth Nelson as assistant treasurer, and Clifford Nelson as secretary (R. 37).

At the time of the hearing in this case, the stockholders in Nelson Co. were Charles Chilberg (president and treasurer) and Clifford Nelson (secretary), each owning 226 shares, and one of their sisters, Greta Nelson Carlson, owning 42 shares. Mrs. Nelson had died in 1950 and other members of the family had sold their interests to Charles Chilberg and Clifford Nelson. Kenneth Nelson sold his stock in Nelson Co. to Clifford Nelson on September 22, 1951, and on that date he also contracted to sell to Clifford the shares due him under his mother's will and resigned as an officer and director of the company (R. 37).

Pursuant to Commission approval in 1956, Charles Chilberg and Clifford Nelson, the principal stockholders in Nelson Co., acquired R. A. Byrnes, Inc. (R. 37), a motor common carrier authorized to carry general commodities over irregular routes between New York City and certain points in New Jersey, Pennsylvania, the District of Columbia, Maryland and Virginia, as well as between certain points in New Jersey and points in the latter states and the District of Columbia (R. 40).³ Earlier, in 1953, the

³ See *Charles G. Chilberg and Clifford J. O. Nelson—Control—R. A. Byrnes, Inc.*, MC-F-5749, unreported decision by Division 4, May 15, 1956. Byrnes is also authorized to carry

Commission had denied the applications of Nelson Co. and its stockholders to acquire another common carrier with authority to transport general commodities over irregular routes between points in New Jersey and other points in New Jersey, New York, Connecticut and Pennsylvania. *L. Nelson & Sons Transp. Co.—Purchase—White's Exp.*, 59 M.C.C. 675.

2. Appellant Gilbertville Trucking Co., Inc. ("Gilbertville Co."), is a motor common carrier, authorized to carry general commodities over regular and irregular routes within Massachusetts and over irregular routes between certain points in New York, New Jersey, Connecticut and Rhode Island, and to carry specified commodities over some regular and some irregular routes between certain points in New England, New York, New Jersey and Delaware (R. 40-41).

Gilbertville Co. was incorporated in Massachusetts in 1940 with its principal place of business at Gilbertville, Massachusetts, and was solely owned by one Wilfred Vaction (R. 38). On March 1, 1953, Kenneth Nelson assumed control of Gilbertville, and began to operate it (R. 65-66), pursuant to an agreement to purchase the entire stock of the company.⁴

specified commodities between certain points in Maryland, Pennsylvania, Delaware, New Jersey and the District of Columbia (R. 40). The acquisition of Byrnes was approved with the understanding that it would be merged into Nelson Co. after certain tax advantages were obtained (R. 67).

⁴The contract was executed one day later, on March 2, 1953 (R. 38), and the stock certificates delivered in July 1953 (R. 211, 229-230, 308). The examiner's finding that Kenneth Nel-

While some shares are now in the names of his wife and of the firm's terminal manager, Kenneth Nelson is the sole beneficial owner of the stock of Gilbertville (R. 38-39).

The service of Gilbertville was enlarged by the purchase in 1954, with Commission approval (R. 686-688), of the operating rights of Lewis Marmer, doing business as Wolff's Express (R. 41-42, 66). It thus acquired common carrier authority to transport in interstate commerce general commodities over 17 regular routes between Lowell, Massachusetts, and Boston, Massachusetts, serving certain intermediate and off-route points, and over irregular routes between other points in Massachusetts (R. 41, 42).

B. RELATIONSHIPS BETWEEN KENNETH NELSON, NELSON CO. AND GILBERTVILLE CO.

1. As above stated, Kenneth Nelson was an officer, director and stockholder of Nelson Co. until September 22, 1951, when he sold his stock to his brother and resigned his corporate offices. Thereafter, he continued to occupy office space in Nelson's headquarters at Rockville-Ellington, Connecticut, where he was em-

son actually took control of the company on March 1, 1953, is clearly established. R. 212-213, 224.

⁵ Since at that time Wolff's Express and Gilbertville Co. together operated less than 20 motor vehicles, the acquisition was not considered under Section 5, but under regulations promulgated under Section 212(b) of the Interstate Commerce Act, 49 U.S.C. 312(b).

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ployed by Nelson as a so-called "free-lance" tariff consultant; Nelson Co. was his only client and it paid him over \$15,000 in 1952 and over \$13,000 in 1953 (R. 65).

In January 1953, while still consultant for Nelson Co., Kenneth Nelson became interested in and discussed the purchase of Gilbertville Co. (R. 65). He took control of Gilbertville Co. on March 1, 1953, *supra*, p. 5. Part of Kenneth Nelson's "continued employment" by Nelson Co. in 1953 was "concurrently with his management and operation of Gilbertville [Co.]" beginning March 1, 1953 (R. 61). Since Gil-

"The term "free lance" was put in quotation marks by the examiner (R. 45, 65), Division 4 (R. 90), and the Commission (R. 19). Each accompanied the words "free lance" with statements contradicting Kenneth Nelson's alleged independence; and it seems clear that the quoted term was used to indicate the absurdity of the contention that Kenneth Nelson was an independent contractor when he was employed solely by Nelson Co., not as a finding in appellants' favor as they assume (Br. pp. 24-25). In quoting "free lance," the examiner, Division 4 and the Commission were citing the testimony of Solomon, the accountant and long-time financial advisor of the Nelsons, Chilbergs and their companies, who stated that Kenneth Nelson was a "free-lance tariff consultant" (R. 243, 276) but admitted that "all" of Kenneth Nelson's income as tariff consultant came from Nelson Co. (R. 358-360).

The examiner's finding that Kenneth Nelson worked for Nelson Co. after taking over Gilbertville Co. is clearly required by the testimony at R. 361, on cross-examination, of appellants' witness Solomon, the accountant and long-time financial advisor of the Nelsons, Chilbergs and their companies, who advised Kenneth Nelson on his purchase of Gilbertville Co. (R. 65). Appellants (Brief, p. 25, fn. 15) seek to discredit this

bertville Co. recorded administrative and general expenditures of only \$4,389.37 in 1953 (R. 45, 166), "a reasonable inference may be drawn that Kenneth received little or nothing as salary in that year, and, consequently, that his 'earnings' of over \$13,000 as tariff consultant to Nelson were in the nature of a subsidy to Gilbertville" (R. 66).

2. After the purchase by Kenneth Nelson, Gilbertville Co.'s headquarters were relocated in the building at Rockville-Ellington, Connecticut, which is the headquarters of Nelson Co. and Byrnes (R. 43). Gilbertville Co. uses five terminals. Four of them, at Rockville-Ellington, Newton (Massachusetts), Woonsocket (Rhode Island), and Long Island City, New York, are shared with Nelson Co. under a sublease from Nelson Co.; the other is at Gilbertville, Mass-

witness as only "guess[ing]" without identifying him as their own. They also assert that the witness's use of a conditional verb indicates doubt; in answer to the examiner, he stated (R. 361) that some of Kenneth Nelson's services as tariff consultant for Nelson Co. for which he was paid in 1953 "would have to be after" his acquisition of Gilbertville. But this witness habitually used the conditional when he intended a simple affirmative or negative. On several other occasions, he corrected himself after prompting by counsel and the examiner, e.g. (R. 285, 286-287).

Division 4 expressly affirmed this finding of the examiner (R. 90). The full Commission referred to Kenneth Nelson's maintaining an office "from September 1, 1951, to March 1, 1953" at a Nelson terminal where he served as tariff consultant (R. 19). But the Commission nowhere indicates its rejection of the prior findings. Since the accountant's testimony is uncontradicted, and there is no evidence whatever supporting a cut-off date of March 1, we believe the Commission's statement was an inadvertent error.

achusetts (R. 43-44, 46-47).^{*} At least 25 percent of the repairs on Gilbertville Co.'s equipment are made by Nelson Co.'s mechanics at the Rockville-Ellington terminal (R. 48). At the four shared terminals and in various other cities served by the carriers, Nelson Co. and Gilbertville Co. have the same telephone listing (R. 47), and they share the use of leased telephone lines (R. 43).

At the time of its acquisition by Kenneth Nelson, in March 1953, Gilbertville Co. owned one truck, three tractors and four trailers (R. 44) and its books showed a deficit of \$39,868 (R. 66). By July 31, 1956, it had increased its equipment stock to 15 trucks, 12 tractors and eight trailers (R. 44). This resulted in part from purchases of used equipment from Nelson Co. (R. 47).⁹ Gilbertville Co.'s operating revenues increased from \$75,489 in 1953 to \$423,237 in 1955, as com-

^{*}The terminals at Rockville-Ellington, Newton and Woonsocket are leased by Nelson Co. from The Bergson Company, which is a real estate holding company, the stock in which is owned equally by each of the seven children of Mrs. Nelson (R. 39, 43). Besides the four terminals it shares with Gilbertville Co., Nelson Co. has another terminal in Philadelphia, Pa. (R. 43).

Gilbertville Co.'s terminal manager at Gilbertville, Massachusetts, had been an employee of Nelson Co. for 15 years before being employed by Kenneth Nelson (R. 45).

⁹The initial poor standing of Gilbertville Co. and its early acquisitions of equipment caused its financial situation to become "precarious" in early 1954, in the opinion of Kenneth Nelson's accountant (R. 66). This situation led to consideration of merging Gilbertville Co. and Nelson Co. (R. 66), which was suspended while arrangements were made for two other acquisitions—by Gilbertville Co. of the operating rights of Wolff's Express (p. 6, *supra*), and by Nelson Co. of R. A. Byrnes, Inc. (p. 4, *supra*) (R. 66-67).

pared with Nelson Co.'s increase from \$895,774 to \$924,607 over the same period (R. 68). On November 8, 1955, Nelson Co. owed Gilbertville Co. over \$39,000 for interline settlements, an accumulation for the three years 1953-55, and Gilbertville Co. owed Nelson Co. approximately \$19,000 in equipment rentals (R. 48, 49), indicating that "[t]hey are extremely liberal one with the other with respect to debit balances" (R. 59). The hearing examiner stated that "it may reasonably be inferred from the phenomenal growth in its [Gilbertville Co.'s] revenues that Charles Chilberg and Clifford Nelson and other members of the Chilberg-Nelson family extended a helping hand to Gilbertville in the development of its custom" (R. 68).

In addition to the purchased equipment, Gilbertville Co. regularly utilizes in its service vehicles leased from Nelson Co. (R. 44). It usually has about three trucks and two or three tractors on lease from Nelson Co. for terms of 30 days or more, and leases each day from Nelson Co. from one to six more tractor-trailer units and several trailers on a trip basis (R. 47). To facilitate such leasing, printed form leases are used and Gilbertville Co. keeps lists of vehicles owned by Nelson Co., described by make, type, registration and serial number (R. 47). Gilbertville Co. also maintains a complete file of doctor's certificates for all of Nelson Co.'s drivers and on numerous occasions the same driver is employed by both Gilbertville Co. and Nelson Co. during the same payroll period or even the same day (R. 48). When one of the companies handles a shipment destined for a point

on the lines of the other, the interchange of traffic is often accompanied by an "interchange" of equipment—that is, the vehicle carrying the shipment is leased at the interchange point from the initial carrier by the destination carrier, which also employs the same driver, thus permitting an uninterrupted through movement of the shipment (R. 48, 63).

Gilbertville Co. interchanges traffic amounting to approximately 5 percent of its total revenue with Nelson Co. and another 4 or 5 percent with Byrnes (R. 48).¹⁰ It receives a flat 40 percent on all traffic interlined with Nelson Co., regardless of the length of their respective hauls (R. 48-49). Nelson Co. also does all of the billing on shipments interlined with Gilbertville, whether the shipment is prepaid or collect and regardless of which carrier makes delivery (R. 49). On various occasions, Commission employees observed instances in which freight of one carrier (*i.e.*, delivered to it and moving under its bill) was being transported by the other, indicating a practice by Nelson and Gilbertville Cos. "of commingling or pooling their shipments to suit their convenience" (R. 49).

The relations between the two companies came under the scrutiny of employees of the Interstate Commerce Commission who visited the offices of Nelson Co. at Rockyville-Ellington, Connecticut, in November 1954 and "observed Kenneth [Nelson] engaged in activities believed to be in furtherance of

¹⁰ In addition, a substantial portion ("no more than 15 percent") of Gilbertville's traffic "could reasonably or lawfully have been transported by Nelson [Co.]" (R. 68).

Nelson [Co.'s] business" (R. 45).¹¹ Subsequent inspections were made by Commission agents in November 1954 and November 1955, at the terminal at Newton, Massachusetts, occupied jointly by Gilbertville Co. and Nelson Co. (R. 45-46), and were described at the hearing.

C. PROCEEDINGS BEFORE THE COMMISSION

On October 6, 1955 Nelson and Gilbertville Cos. filed an application in ICC Docket No. MC-F-6099 for authority under Section 5 of the Interstate Commerce Act for Nelson Co. to acquire control of Gilbertville Co. by purchase of its stock and to merge Gilbertville's operating rights and property with Nelson Co.; Charles Chilberg and Clifford Nelson also applied for authority to acquire such control (R. 31, 131-181). On December 20, 1955 a formal order was issued by the Commission in No. MC-F-6178 instituting an investigation under Section 5(7) of the Interstate Commerce Act into possible violations of Section 5(4) by operation of Gilbertville Co. and Nelson Co. in a common interest (R. 31, 181-182). The order named as

¹¹ The ICC inspector testified that a second-floor room labeled as the Gilbertville Co. office was not occupied (R. 533). Kenneth Nelson was in the first-floor quarters of Nelson Co. and Byrnes, where he operated the teletype, answered the telephone, gave orders to two Nelson Co. employees (R. 532-533) and to others on the intercom (R. 530). He also refused to produce a Nelson Co. teletype message, telling the inspector he had destroyed it (R. 531, 537). The inspector further stated that he asked Clifford Nelson, upon the latter's arrival at the terminal later the same day, how it was that Kenneth Nelson happened to be directing Nelson Co.'s business, and Clifford Nelson "could offer no explanation" (R. 537-538).

respondents the two companies and their stockholders and also provided for a consolidated hearing on the investigation proceeding and the application for approval of the merger (R. 31, 182).

In his proposed report, the hearing examiner set forth the factual findings summarized above. He also noted the prior acquisitions by Nelson and Gilbertville Cos. and observed that the merger would provide, by combination of the Gilbertville and Byrnes operating rights, a through general commodity service between Massachusetts, Rhode Island and Connecticut as far south as the District of Columbia, and would also enable Nelson to transport its narrow range of commodities throughout the area of Gilbertville's general commodity authority (R. 67). The examiner found the evidence "persuasive that an overall plan or project to create a larger and more significant motor carrier in the New England-Middle Atlantic area using Nelson as a nucleus was conceived and followed" (R. 68-69), either before the purchase of Gilbertville or at the latest in April or May of 1954 (R. 69). "At any rate, events and the interrelations of the respondent carriers following the purchase of Gilbertville mark their operation as that of a unified organization" (R. 69). The examiner concluded that "the acts, practices and arrangements" described, together with the acquisitions by Nelson Co. and Gilbertville Co., and "the circumstances surrounding them, require a finding that control and management in a substantial degree of Nelson and Gilbertville in the common interest of Nelson and its shareholders and of Gilbertville and its shareholders have been

accomplished or effectuated and presumably are being maintained" (R. 70).

On the ground, however, that this illegal control and other violations of Commission regulations appeared to result from "ignorance" and "a degree of carelessness" rather than "wilfulness", the examiner stated that "[a] finding of unfitness by reason of violations is not warranted" (R. 72-73). Arguments by intervenors that the proposed merger would constitute a new service, with an adverse effect on existing carriers were rejected by the examiner on the ground that "the competition which is feared is either already an accomplished fact or capable of becoming so even though the present application is denied", since Gilbertville Co. could continue its present operations and interchanges with Byrnes (R. 74-75). The examiner also found that unification of the carriers would result in "substantial * * * savings" in operating costs and an improvement in the transportation service "presently interchanged" (R. 76). He therefore recommended that the Commission approve the merger application of Nelson Co. and Gilbertville Co. in MC-F-6099, subject to the elimination of certain dormant operating rights of Gilbertville (R. 78), and discontinue the investigation proceeding in MC-F-6178 (R. 79).

Upon exceptions, the Commission's Division 4 issued its report and order on February 26, 1958 (R. 82-95; 75 M.C.C. 45). The division concurred in the examiner's conclusion that the appellants had violated Section 5(4) of the Act, noting that none of the parties had challenged the examiner's findings of unlawful control (R. 85, 89, 91). The division's finding of

unlawful control was "not * * * based on any single factor or several selected from the whole, but on the entire chain of circumstances revealed by the record" (R. 91). However, contrary to the examiner's recommendation, the division decided that the parties' application should be denied. It ruled that "[c]onsidering all the circumstances" the violation "should not be 'blessed' by approval", but should be terminated, stating that "the transaction has not been shown to be consistent with the public interest" (R. 93). The division pointed out that by "premature consummation" of mergers as here, the Commission is "impeded in the discharge of [its] statutory duty to consider the entire transaction in all its aspects" (R. 92). And it emphasized that Nelson's and Gilbertville's principals were familiar with the motor carrier business and its regulation, and had participated in other Section 5 proceedings (R. 92-93). Accordingly, Division 4 entered an order denying the merger application and directing all the respondents "to terminate the violation of the provisions of Section 5(4) of the Interstate Commerce Act found * * * to have been accomplished and to be continuing", in the unlawful common control of Nelson and Gilbertville Cos. (R. 94-95). One Commissioner dissented (R. 93).

The proceedings were thereafter reopened by the division for reconsideration (R. 95-96), and then transferred to the full Commission (R. 13). The entire Commission issued its report and order on reconsideration on June 9, 1959 (R. 11-26). It affirmed the findings of violation and found "that the control and management of the L. Nelson & Sons

Transportation Co., in a common interest with Gilbertville Trucking Co., Inc., has been effectuated and is continuing in violation of Section 5(4) of the Interstate Commerce Act" (R. 23-24). In that connection, it found that Kenneth Nelson, who purchased the entire capital stock of Gilbertville Co. in 1953, was "affiliated" with Nelson Co. within the meaning of that term in Section 5(6) of the Act (R. 21); and noted that Section 5(5) provides that acquisition by a person "affiliated" with another carrier "shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers" in violation of Section 5(4).

The Commission recognized, citing its recent decision in another case, that violation of Section 5(4) "is not necessarily a bar to approval * * * if, upon consideration of all the facts, it clearly appears that the public interest will be served best by such approval" (R. 22). It determined, however, that the evidence would not "support a finding that the transaction for which authority is sought would be consistent with the public interest" (R. 23).¹² Accordingly, an order was entered on June 9, 1959, denying the application and directing respondents to terminate the violation of Section 5(4) and "to divest themselves of any and all interest which they may have

¹² Three Commissioners dissented. Commissioner Freas concurred in the result, expressing the view that the application to merge should be denied "not so much because of any evidenced disregard of the law but principally because of a lack of a clear showing that there is a paramount overriding public interest which would best be served by a grant of the approval sought" (R. 24).

in the capital stock in Gilbertville Trucking Co., Inc.
 * * * within 60 days" (R. 25-26).¹¹

D. THE DECISION OF THE DISTRICT COURT

By its opinion and judgment of July 7, 1961, the three-judge district court dismissed the appellant's complaint and sustained the Commission's action (R. 108-127). The court (per Judge Wyzanski) held that the Commission's findings were "satisfactory not merely in form but in substance", were supported by the record (R. 121), and fulfilled "[t]he purpose * * * to furnish the parties and the reviewing court with a sufficiently clear basis for understanding the premises used by the tribunal" (*ibid.*). With the "dominant issue of fact" correctly resolved, the presence of a few "inconsequential" or "ambiguous" statements in the agency opinion does not, he stated, require a "new total appraisal" (R. 121-122).

This order of June 9, 1959, has not yet taken effect. Nelson Co. and Gilbertville Co. thereafter filed with the Commission a petition for reconsideration of its report and order, which was denied by order of February 15, 1960 (R. 27-28). Nelson Co. then filed a petition seeking voluntary cancellation of its own outstanding operating authority, upon the condition that the Commission would vacate its orders of June 9, 1959, and February 15, 1960 (R. 7-8). On July 5, 1960, the Commission denied this Nelson Co. petition, and ordered compliance 15 days thereafter (R. 28-29). After the instant action was filed in the district court on August 5, 1960, the Commission postponed the effective date for compliance until its further order (R. 99, 101-102).

While the complaint below was directed in terms to the orders of the Commission on June 9, 1959, February 15, and July 5, 1960 (see R. 25, 27, 28), the substantive issues are all presented by the order of June 9, 1959, set forth at R. 5-26.

The court observed that the subsidiary findings established a violation of Section 5(4), the Commission's conclusion being "not merely reasonable but inevitable" (R. 122). The court noted particularly that "purposeful dovetailing for a common set of ends" was shown by the convergence of "[m]any phases" of the business of Nelson and Gilbertville Cos., beginning with the purchase of Gilbertville Co. by Kenneth Nelson "at a moment when he is not shown to have severed a relationship to the arterial traffic nerve of" Nelson Co. (R. 122). This determination did not "require resort to any legislatively enacted definitions or presumptions," although it was "confirmed" by such provisions in the Interstate Commerce Act, Sections 5 (i), (6) (R. 123).

Finally, the court held that the Commission properly exercised its discretion to choose an appropriate remedy for violation of Section 5(4). Divestiture orders were authorized by the broad power under Section 5(7), to "take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation". Indeed, the order of divestiture had a "fitness so perfect" to the offense of unlawful control as to be "obviously a suitable exercise of discretion" (R. 125). Similarly, the court upheld denial of the company's application to merge. While approval of an unlawfully effectuated merger in "some imaginable circumstances * * * might conceivably be in the public interest", the Commission's refusal to convert into a "lawful unification" "a relationship already in part achieved by unlawful conduct is

a clearly proper exercise of a delegated discretionary authority" (R. 126).

SUMMARY OF ARGUMENT

The Interstate Commerce Act authorizes the Commission to approve mergers, acquisitions of one carrier by another, or common control of two carriers, which it finds "consistent with the public interest" (Section 5(2)). Section 5(4) declares any such transaction consummated without approval by the Commission to be unlawful. Section 5(5) provides that various transactions involving persons "affiliated" with a carrier "shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers" in violation of 5(4). Section 5(6) defines "affiliation" with a carrier as any relationship giving "reason to believe" that a person will operate "in the interest of" that carrier or any other carrier controlled by him.

These prohibitions are applicable to motor carriers. Their importance is demonstrated by the Commission's experience in many cases, in which motor carriers seek to evade restrictions upon their operating authority by unlawful control of other carriers and to accomplish what Congress sought to prevent—an acquisition "without supervision by the Commission and without opportunity to consider the question of public interest" (77 Cong. Rec. 4857).

I

In the present case, the hearing examiner, Division 4, the Commission and the district court all correctly found that appellants had violated Section 5(4) by operating Gilbertville Co. and Nelson Co. under common control without Commission approval.

A. The Commission's ultimate finding is clearly supported by adequate subsidiary findings and substantial evidence. The Commission affirmed the findings of unlawful common control made directly under Section 5(4) by the examiner and the division. It also found a violation of Section 5(4) on the ground that Kenneth Nelson was "affiliated" with Nelson Co. within the meaning of Sections 5(5) and 5(6).

Contrary to appellants' contention, there is no material difference between these two approaches. Subsections 5(5) and 5(6) were designed merely "to spell out and make clear the various possible forms of indirect control * * * [Section 5(4)] is intended to prohibit" (S. Rep. 87, 73d Cong., 1st Sess., pp. 9-10). The finding of "affiliation" in this case is simply a finding that, on all the pertinent facts, unlawful common control was effectuated through an intermediary, Kenneth Nelson. This conclusion is clearly supported by substantial evidence which shows that, after Kenneth Nelson's purchase of Gilbertville Co., the two companies were brought together into what the examiner found was "operation as * * * a unified organization" (R. 69). Appellants have never disputed the factual statements of the examiner and the factors considered in other Commission decisions on this subject support the conclusion of unlawful control here.

B. The district court properly sustained the Commission. There was no divergence in legal rationale between the court and the Commission. As above stated, there is no inconsistency between finding a violation of Section 5(4) directly and finding it through the "affiliation" route of Sections 5(5) and 5(6). In any event, the court and Commission each relied upon both statutory approaches. There is no substance to appellants' claim that inconsistencies in the factual statements of the court and Commission warranted reversal and remand.

II

The Commission properly denied appellant's application to merge Nelson Co. and Gilbertville Co. and thereby validate the existing unlawful situation, and properly directed divestiture of appellants' interests in Gilbertville Co.

A. Contrary to appellants' contention, the Commission has not created a new policy of "automatically" denying an application under Section 5(2) whenever a violation of Section 5(4) has been found. The Commission's "more stringent approach" towards such violations (R. 23), which was applied in the *Central of Georgia* case, 307 I.C.C. 39, and reaffirmed here, simply recognizes that one factor in the "public interest" is the "maintenance of respect for and the observance of the law." For applications involving such violations, the test is whether "upon consideration of all the facts, it clearly appears that the public interest will be served best by such approval" (307 I.C.C. at 43, quoted at R. 22). Numerous Commission decisions

reiterate that such violations are weighed against the benefits of approval, but can be outweighed by overriding benefits to the public, or mitigated by proof of lack of awareness of the requirements of Section 5.

This policy is a proper implementation of the statutory criterion of "public interest" since unlawful acquisitions of control would seriously hinder, if not defeat, the administration of Section 5. The Commission's approach is supported by its experience with such cases, and by the policies of other agencies; its validity is not impaired by employment of a less stringent policy in the past.

The Commission properly applied its policy in this case. Appellants used unlawful control over Gilbertville Co. to enlarge operations without Commission approval. While they now seek to rely upon the service cultivated under unlawful control to show the benefit from approval of the merger, the Commission properly gives no weight to such unlawful service. Denial was justified by the existence of the violation of Section 5(4), the clear evidence that appellants were aware of Section 5 requirements; and the absence of any proper showing (not depending upon the violation itself) that the merger of Gilbertville Co. and Nelson Co. would serve the public interest.

B. The Commission's order of divestiture was clearly a proper exercise of its discretion once it had found unlawful control and refused to validate it by approving the merger. The Commission is authorized "to require [appellants] to take such action, as may be necessary, in the opinion of the Commission, to pre-

vent continuance of the violation" (Section (5)(7)). Divestiture is "the usual procedure in investigations under section 5(7)" (*Nigro Freight Lines, Inc.—Purchase—Coady Trucking Co.*, 90 M.C.C. 113, 121 (Div. 3)). It is an appropriate, if not the only feasible, way to terminate unlawful acquisition of control, and it was explicitly put at issue before the agency in this case. Since the Commission had found that the unlawful control was effectuated through Kenneth Nelson as an intermediary, the order properly ran against him.

ARGUMENT

INTRODUCTION: THE STATUTORY SCHEME

A. By Section 5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2), the Commission is authorized to approve merger of carriers, the acquisition of one carrier by another, or the control of two or more carriers by a non-carrier, when it determines that such "proposed transaction * * * will be consistent with the public interest".¹⁴ In determining the "public interest", as this Court pointed out in *McLean Trucking Co. v. United States*, 321 U.S. 67, 82-83, the Com-

¹⁴ The Commission's power to approve mergers and acquisitions of control, along with an immunity from the antitrust laws for approved transactions, was first introduced by the Transportation Act of 1920, 41 Stat. 456, 480, 481-482. Previously, Commission authorization was not required but acquisitions were subject to the Sherman Act. See, e.g., *United States v. Union Pacific R. Co.*, 226 U.S. 61.

Under Section 5 of the 1920 Transportation Act, acquisitions involving consolidation of railroads into single systems had to conform to a national plan of consolidation to be adopted by the Commission. These requirements were eliminated in the revision of Section 5 in the Transportation Act of 1940, 54 Stat. 899, 905.

mission must be guided by the National Transportation Policy which requires it to "promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."¹⁵ Section 5(2)(c) directs the Commission, more specifically, to give weight to the following considerations "among others": "[t]he effect of the proposed transaction upon adequate transportation service to the public; * * * the total fixed charges resulting from the proposed transactions; and * * * the interest of the carrier employees affected". *McLean Trucking Co. v. United States*, 321 U.S. 67, 75. In addition, the Commission has the duty to formulate and consider other factors implementing the statutory criterion of "public interest". *Schwabacher v. United States*, 334 U.S. 182, 193. *McLean Trucking Co. v. United States*, 321 U.S. at 86-88; *United States v. Lowden*, 308 U.S. 225, 238.

B. Since 1933, the Commission's authority to approve mergers has been accompanied by sweeping prohibitions against action taken without Commission approval, a pattern which has been followed in sub-

¹⁵ Before adoption of the National Transportation Policy, similar considerations had been noted by the Court as subsumed under the standard of "public interest". That statutory term itself directs attention, *inter alia*, "to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities". *New York Central Securities Co. v. United States*, 287 U.S. 12; *Texas v. United States*, 292 U.S. 522, 531.

sequent federal regulatory acts.¹⁶ As it now stands, Section 5(4), "in the broadest terms",¹⁷ makes it unlawful, without Commission approval, "to enter into any transaction within the scope of" such approval,

or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. * * * As used in this paragraph and paragraph (5) * * *, the words "control or management" shall be construed to include the power to exercise control or management.¹⁸

¹⁶ Federal Power Act, 49 Stat. 849, Sec. 203, 16 U.S.C. 824b; Federal Aviation Act, 72 Stat. 767, Sec. 408, 49 U.S.C. 1378.

¹⁷ *United States v. Marshall Transport Co.*, 322 U.S. 31, 38.

¹⁸ As originally enacted in the Emergency Railroad Transportation Act of 1933, the present Sections 5(4), 5(5), and 5(6) were numbered 5(6), 5(7), and 5(8). 48 Stat. 218. The paragraphs were renumbered to their present arrangement in the Transportation Act of 1940, 54 Stat. 905, 907-908.

The broad scope of the prohibition against unauthorized "control" is again emphasized by Section 1(3)(b) which provides that, for the purposes of Section 5 and other sections, "where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control."

As the Congressional committee reports stated of 5(4), "A means having been furnished * * * by which all legitimate and desirable forms of unification may be effected, it is intended * * * to prevent all other forms, direct or indirect". S. Rep. 87, 73d Cong., 1st Sess., p. 9; H. Rep. 193, 73d Cong., 1st Sess., p. 16.

Section 5(5) supplements this prohibition, without "in anywise limiting" it, by providing that various transactions involving persons "affiliated" with a carrier "shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers". One of these is a "transaction * * * by a person affiliated with a carrier, * * * if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier". And Section 5(6) provides that

a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

The committee reports explain that these provisions were "designed to spell out and make clear the various possible forms of indirect control * * * which

paragraph [5(4)] is intended to prohibit." S. Rep. 87, 73d Cong., 1st Sess., p. 9; H. Rep. 193, 73d Cong., 1st Sess., p. 16. The reports continued (S. Rep. 87, at pp. 9-10, H. Rep. 193, at pp. 16-17):

These paragraphs have been planned in the light of what has already been done through myriad devices without commission supervision and in defiance of the will of Congress. * * * The provisions of paragraph [(4)] would be of little effect unless the language contained therein were construed to include control or management effectuated or exercised indirectly through the use of legal devices such as holding companies, voting trusts, and combinations of affiliated interests. It is therefore intended by the provisions of paragraph [(5)], [(6)] * * * to make sure that paragraph [(4)] covers such types of control and management.

The House Manager of the bill similarly observed (77 Cong. Rec. 4857):

The important point is that unifications and groupings of railroads have been accomplished entirely without supervision by the Commission and without any opportunity to consider the question of public interest. * * * It is to correct this condition, and to prevent through the use of holding companies and other devices the defeat of the congressional will, that this bill has been drawn.

Petitioners stress that Congress was concerned in the original passage of Sections 5 (4), (5), and (6), with the elaborate corporate structures of the railroad empires (App. Br. pp. 18-19, and nn. 9, 10). It is true, of course, that in 1933 the Commission's juris-

diction was limited to railroads. But when the Motor Carrier Act was passed in 1935, precisely the same policy was extended to motor carriers. The 1935 Act contained a provision similar to Section 5 (Section 213, 49 Stat. 543, 555), which, as explained by the Senate Manager of the bill, conferred authority upon the Commission to approve mergers and acquisitions "and prohibits all other forms of unification". 79 Cong. Rec. 5655. It was recognized that motor carriers were then mostly "small enterprises" but there were "rumors" of merger plans. "In view of past experience with railroad and public utility unifications, it was regarded as necessary that the Commission have control over such developments". 79 Cong. Rec. 5654-56.¹⁹ In the Transportation Act of 1940, this separate motor carrier provision was repealed, and Section 5 was redrafted to cover all motor, rail and water carriers subject to the Commission's jurisdiction. There is no doubt that the provisions and prohibitions of Section 5 are applicable to motor carriage, as well as to railroads, and that the guiding policy considerations are the same. See *McLean Trucking Co. v. United States*, 321 U.S. at 78-79.

C. The Commission's recent experience in administration of the merger and acquisition provisions has been chiefly in the motor carrier field. A point re-

¹⁹ Senator Wheeler added that Commission control should extend "where the number of vehicles involved is sufficient to make the matter one of more than local importance" 79 Cong. Rec. 5655. Accordingly, the Commission's authority over motor carrier mergers and acquisitions was, and is, limited to those involving more than 20 vehicles (Section 5(10), 49 U.S.C. 5(10)). See Section 213(e), 49 Stat. 556.

peatedly made in these decisions is that unlawful merger or acquisition of control can alter a carrier's circumstances in ways detrimental to the public interest even if the transaction is belatedly brought before the Commission for its approval. Premature consummation of even part of a merger, it has been noted, may damage the financial stability of a carrier and the adequacy of its service.²⁰ Moreover, such violations can establish new services which are not justified by the public interest.

Typically, a motor carrier, or its principals or intermediaries, acquires unlawful control of another carrier in order to expand its operations "circumventing the restriction in * * * [its existing] operating rights" (*Smithsons Holdings—Control—Ontario Frt. Lines Corp.*, 70 M.C.C. 623, 625, 628 (Div. 4)).²¹ In

²⁰ For that reason, the Commission has held that when a merger or acquisition is subject to its approval because it involves interstate operating rights, the carriers may not consummate any part of the transaction. *Von Der Ahe Van Lines, Inc.—Lease and Purchase—Bee-Line*, 87 M.C.C. 53, 60. *Interstate M. Frt. System—Purchase—Capital Frt. Lines, Inc.*, 65 M.C.C. 37, 54 (Div. 4); *Texas, N. Mex. & Okla. Coaches, Inc.—Purchase—Aaron*, 55 M.C.C. 269, 275 (Div. 4). In the cited cases, the carriers sought to evade the Commission's jurisdiction by first consummating the parts of the merger involving transfer of equipment (*Von Der Ahe*) or intrastate operating rights (*Interstate M. Frt.*; *Texas, N. Mexico, & Okla. Coaches*). The Commission explained how such premature acts can damage the public interest by impairing interstate operations of the transferor carrier, causing losses and otherwise affecting carriers' financial stability. 65 M.C.C. at 54, 55 M.C.C. at 275.

²¹ See, e.g., cases in following note and *Coldway Food Express, Inc.—Control and Merger*, 87 M.C.C. 123, 130-131 (Div. 4); *Dorn's Transportation, Inc.—Purchase—Phillips Exp., Inc.*, 87 M.C.C. 111, 112, 116 (Div. 4); *Congdon—Purchase—Wadkins*, 50 M.C.C. 781, 784 (Div. 4).

extreme cases, such violations have occurred after the Commission denied applications by the carriers seeking to achieve the same expansion lawfully.²² Unlawful expansion may be attempted through control of dormant companies, which are then reactivated.²³ If advance Commission approval had been requested, as required by law, the Commission would have required a showing of the need for the new or extended service.²⁴ By unlawfully combining operations under common control, the two carriers, having actually experienced a close relationship before their belated application to merge is filed, may appear to be in better position to argue the benefits which would flow from continuing unified service.²⁵ But the Commission of course, cannot countenance such an improper advantage.

²² *Krapf—Purchase—Altemose*, 85 M.C.C. 441, 443, 445 (Div. 4); *Houff—Control—Elliott Bros. Trucking Co., Inc.*, 80 M.C.C. 637, 648 (Comm.); *Black—Investigation of Control*, 75 M.C.C. 275, 279 (Div. 4); *Stacks—Investigation of Control*, 75 M.C.C. 625, 627, 637 (Div. 4).

²³ *Von Der Ahe Van Lines*, *supra*, 87 M.C.C. at 59; *Exley Express, Inc.—Purchase—Olsen*, 85 M.C.C. 396, 397, 399 (Comm.); *Black*, *supra*, 75 M.C.C. at 279, 282-283; *Smithsons Holdings*, *supra*, 70 M.C.C. at 625, 628.

²⁴ *Houff Transfer v. United States*, 105 F. Supp. 851, 855, (W.D. Va.); *Shein v. United States*, 102 F. Supp. 320, 324-326 (D.N.J.), affirmed *per curiam*, 343 U.S. 944; *Fahwell v. United States*, 69 F. Supp. 71 (W.D. Va.), affirmed *per curiam*, 330 U.S. 807.

²⁵ *Dorn's Transportation*, *supra*, 87 M.C.C. at 112-113; *Exley Express, Inc.*, *supra*, 85 M.C.C. at 398; *Deaton Truck Line, Inc.—Purchase—Capitol Freight Lines, Inc.*, 70 M.C.C. 355, 360 (Div. 4); *Cortland Fast Freight, Inc.—Purchase—H. J. Korten, Inc.*, 60 M.C.C. 321, 329 (Div. 4); *Pacific Greyhound Lines—Control and Merger*, 56 M.C.C. 415, 438-439 (Div. 4).

Where the Commission can discover the facts concerning prior unlawful control, it responds by weighing the violations against grant of the belated application to merge, as shown *infra*, pp. 43-47, 50-54, and by giving "no weight whatsoever" to alleged benefits which depend upon the unlawful operations.²⁶ Where the violations are undiscovered, of course, the parties may succeed in accomplishing what Congress sought to prevent—an acquisition "without supervision by the Commission and without any opportunity to consider the question of public interest" (77 Cong. Rec. 4857).

I

APPELLANTS WERE PROPERLY FOUND IN VIOLATION OF SECTION 5(4) OF THE ACT, ON THE GROUND THAT NELSON AND GILBERTVILLE COS. WERE UNDER UNLAWFUL COMMON CONTROL.

As the court below stated, this case presents "one dominant issue of fact * * * the issue of common control" (R. 122). On this point, the record has been canvassed by the hearing examiner, the Commission's Division 4, the full Commission, and the district court. All have agreed that Nelson and Gilbertville Cos. were controlled or managed in a common interest, without Commission approval, in violation of Section 5(4) of the Act. We submit that this issue was correctly decided by the administrative agency and that there is, indeed, no serious basis for challenge.

²⁶ *Deaton Truck Line*, *supra*, 70 M.C.C. at 360; *Cortland Fast Freight, Inc.*, *supra*, 60 M.C.C. at 329; *Pacific Greyhound Lines*, *supra*, 56 M.C.C. at 438-439.

A. THE COMMISSION CORRECTLY FOUND UNLAWFUL COMMON CONTROL OF NELSON AND GILBERTVILLE COS.

In its decision on reconsideration, the full Commission summarized the evidence, after noting that "none of the parties * * * have disputed the factual statements of the examiner in his report, which were generally adopted in the prior report of the division" (R. 19). It then concluded (R. 21):

Considering all facts of record, we are of the opinion, and find that Kenneth Nelson was affiliated with Nelson within the meaning of section 5(6) at the time he purchased the stock of Gilbertville, and that the conclusive presumption of section 5(5) applies; we affirm the findings in the prior report, and in the report of the examiner, that the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing in violation of section 5(4) of the act.

1. Appellants (Br. pp. 13-19) assail the Commission for failing to make subsidiary findings to support the finding of "affiliation", and for failing to indicate the precise "relationship" between Kenneth Nelson and Nelson Co. In the first place, appellants ignore that, aside from the Commission's ruling on Kenneth Nelson's affiliation with Nelson Co., it also specifically "affirm[ed] the findings" of Division 4 and the examiner (R. 21). The latter had found that the two companies "are controlled or managed in a common interest in violation of section 5(4)", without expressly invoking the affiliation provisions of sections

5(5) and 5(6), but rather on the basis of the "entire chain of circumstances revealed by the record" (R. 91, see R. 70).

But, in any event, appellants are in error in their apparent belief that "affiliation" for purposes of subsections 5(5) and 5(6) always connotes a precise relationship—*e.g.*, "holding company", "brother" (App. Br., p. 18), and that it is an "entirely different" concept from unlawful control prohibited by Section 5(4) (App. Br. pp. 28-29).

On the contrary, there is only one statutory prohibition against unlawful control, that set forth in Section 5(4). As we have shown *supra*, pp. 25-27, Congress did not intend, in Sections 5(5) and 5(6), to add a separate condemnation of particular categories of relationships. Rather, it sought to emphasize the broad reach of Section 5(4) by adding a legislative gloss—"to spell out and make clear the various possible forms of indirect control * * * which [5(4)] is intended to prohibit" and "to make sure" that Section 5(4) was effective to thwart all manner and means of "indirect control", however attained (S. Rep. 87, 73d Cong., 1st sess., pp. 9-10).

Section 5(4) defines "control" to include "the power to exercise control or management" and prohibits its unauthorized accomplishment "however such result is attained, whether directly or indirectly". Such power may be found in specific legal relations. Section 5(4) explicitly points to "common directors, officers or stockholders, a holding or investment company or companies, a voting trust or trusts." But in order to reach all unlawful control "however * * * attained",

it also extends to control obtained by "any other manner whatsoever". See *United States v. Marshall Transport Co.*, 322 U.S. 31, 38.

"Affiliation" is similarly defined in Section 5(6) to include the identical legal devices cited in Section 5(4). To reach the "myriad devices" possible (S. Rep. 87, *supra*), Section 5(6) also extends to any "relationship" adduced from "the method of, or circumstances surrounding organization or operation" of a carrier and "any other direct or indirect means" which make it "reasonable to believe" that a person will manage the affairs of another carrier controlled by him in the interests of the carrier with which he is "affiliated". As the Commission pointed out in *Nigro Freight Lines, Inc.—Purchase—Coady Trucking Co.*, 90 M.C.C. 113, 119-120, circumstances bearing on the "degree of relationship" include relations between the carriers' officers, directors and stockholders and, also, the carriers' operating practices and business dealings with each other.

"Affiliation" is therefore flexible enough to cover the "myraid devices" (*ibid.*) which might be used to acquire control of carriers without Commission supervision, whether through complex corporate configurations or the disingenuous use of an individual as an intermediary or "front". A finding of "affiliation" may, as in this case, be a conclusion drawn from all the facts as to the likelihood that an individual will act in behalf of a particular carrier.

2. So viewed, the Commission's finding of "affiliation" in this case is a finding that, on the basis of all the pertinent facts, common control was unlawfully

effectuated over Nelson and Gilbertville Cos. by the use of an intermediary, Kenneth Nelson. The Commission's conclusion to that effect must be accepted if supported by substantial evidence. *United States v. Pierce Auto Lines*, 327 U.S. 515; *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, 508.

We submit that the Commission's determination is amply supported by the record. We have set forth in the Statement (*supra*, pp. 6-12), the details concerning the relationships of Kenneth Nelson, Nelson Co. and Gilbertville Co. The Commission's summary of the evidence in its report shows what the examiner found, *i.e.*, that the two companies have been brought together into "operation as * * * a unified organization" (R. 69). The findings include the joint use by Nelson and Gilbertville Cos. of terminals and telephone numbers; various arrangements by which the companies drew freely on each other's vehicles and drivers, including constant and frequent leasing of vehicles by Gilbertville from Nelson Co.; the pooling and commingling of shipments to suit their convenience; arbitrary division of revenues from interline carriage according to a fixed formula, instead of the usual trade practice of computing the actual length of the companies' respective hauls; the transportation of interlined shipments as a through movement, by transfer of vehicle and driver from one company's employment to the other; the extremely "liberal" handling of inter-company debit balances; and various activities engaged in by officials and employees of each company for the benefit of the other (R. 20-21).

This unlawful unified control in violation of Section 5(4) was achieved by Kenneth Nelson's purchase and management of Gilbertville Co. Thus, in Section 5(6) terms, we have far more than "reason to believe" that Kenneth Nelson was acting "in the interest of" Nelson Co., and hence "affiliated" with it. Events subsequent to the purchase in March 1953 have laid to rest any conjecture and have demonstrated beyond doubt that unlawful control was achieved through his actions.

Since the finding of "affiliation" here is a conclusion drawn from all the facts as to the relations between Kenneth Nelson, Nelson Co. and Gilbertville Co., see *supra*, pp. 33-34, these facts themselves constitute the "adequate subsidiary findings" (*Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-194) required to support the decision. No intervening findings were appropriate or necessary. The Commission, applying its "expert's familiarity with industry conditions" (*American Trucking Ass'ns v. United States*, 344 U.S. 298, 310, 314), properly evaluated the record and determined whether the business relations between Nelson and Gilbertville companies were those of independent concerns or demonstrated the existence of unlawful "control or management in a common interest".

Even though appellants never disputed the factual statements of the examiner and Division 4 before the Commission (R. 19), they now urge that certain of the Commission's subsidiary findings are not supported by substantial evidence (Br., pp. 48-54). In large part, appellants' argument is that

certain of the practices of Nelson and Gilbertville Cos. cited by the Commission are common in the trucking industry or are explained by legitimate business considerations rather than unlawful common control.²⁷ None of these attempted justifications of separate practices can detract significantly from the Commission's determination that the entire picture demonstrates the illegality of the relationship between the two carriers.

As the Commission's other decisions on this subject demonstrate, no one factor is ever considered decisive in itself. Division 3 pointed out recently in *Gate City Transport Co.—Control—Square Deal Cartage*, 87 M.C.C. 591, 594, that the common use of terminal facilities and employees by two carriers "does not necessarily connote common control" but it "must be considered along with all the other facts." See, to the same effect on leasing and interchange, *Kenosha Auto Transport Corp.—Investigation of Control*, 80 M.C.C. 59, 77 (Div. 4). Similarly, the examiner here pointed out (R. 64) that family ties are pertinent to an investigation into possible unlawful acquisition or control, although not themselves determinative. Applicants take the Commission to task for allegedly

²⁷ In addition, appellants dispute the Commission's statements as to (1) "managerial" activities for one carrier by officers of the other, supported by the record as to Kenneth Nelson's action in the Nelson Co. office, at R. 530-533, 539-540, and Clifford Nelson's Acts at R. 558-560; and (2) the shifting of equipment and driver from the employ of one company to another at interchange points, supported by the record at R. 510, 514-515, 541-543, 661-662.

finding "affiliation" solely because of Kenneth Nelson's blood relation with his brothers (B., pp. 18-19). Of course, no such rule was promulgated or applied here. The Commission is aware, however, that in seeking to conceal an unlawful acquisition of control, parties may—and frequently do—utilize close relatives,²⁸ as well as business associates or friends.

Without undue emphasis upon any one aspect of the instant case, it is significant to note how many of the factors cited by the Commission here are recurrent indicia of unlawful transactions. In many cases finding violations of Section 5(4), the Commission has cited the sharing by the two carriers of common terminal and office facilities;²⁹ the sharing of telephone numbers (listed in both names) and teletype systems;³⁰ generous credit arrangements between the

²⁸ *Nigro Freight Lines, Inc.—Purchase—Coady Trucking Co.*, 90 M.C.C. 113, 119-120 (Div. 3); *Dorn's Transportation, Inc.—Purchase—Phillips Exp., Inc.*, 87 M.C.C. 111, 115 (Div. 4); *Smithsons Holdings—Control—Ontario Frt. Lines Corp.*, *supra*, 70 M.C.C. 623, 626 (Div. 4). In the last cited case, as here, the Commission had to reject a plea that the "human quality of family ties" justified the relation between the two carriers which was found to constitute unlawful control in violation of Section 5(4).

²⁹ *Nigro Freight Lines, Inc.*, *supra*, 90 M.C.C. at 118-119; *Gate City Transport Co.*, *supra*, 87 M.C.C. at 593-594; *Coldway Food Express, Inc.—Control and Merger*, 87 M.C.C. 123, 128-129 (Div. 4); *Dorn's Transportation, Inc.*, *supra*, 87 M.C.C. at 115; *Kenosha Auto Transport Corp.—Investigation of Control*, 80 M.C.C. at 69-72; *Black—Investigation of Control*, 75 M.C.C. 275, 281 (Div. 4).

³⁰ *Nigro Freight Lines, Inc.*, *supra*, 90 M.C.C. at 118-119; *Coldway Food Express, Inc.*, *supra*, 87 M.C.C. at 128-129; *Kenosha Auto Transport Corp.*, *supra*, 80 M.C.C. at 72.

carriers;³¹ the performance by one of the two carriers of all the billing on freight interlines between them regardless of which delivered;³² the provision of other services for one carrier by employees of the other;³³ the active leasing of vehicles by one carrier from the other;³⁴ special arrangements between them for repair and maintenance of vehicles;³⁵ increase in interlining of freight between the two carriers;³⁶ and the use of vehicles which are leased mid-trip from one carrier to the other, with the same driver being employed to carry the interlined freight under the authorities of both carriers.³⁷

³¹ *Cortland Fast Freight, Inc.—Purchase—H. J. Korten, Inc.*, 60 M.C.C. 321, 325-326.

³² *Coldway Food Express, Inc.*, *supra*, 87 M.C.C. at 129; *Esley Express, Inc.—Purchase—Olson*, 85 M.C.C. 396, 400 (Comm.).

³³ *Gate City Transport Co.*, *supra*, 87 M.C.C. at 593; *Kenosha Auto Transport Corp.*, *supra*, 80 M.C.C. at 72; *Cortland Fast Freight, Inc.*, *supra*, 60 M.C.C. at 326.

³⁴ *Nigro Freight Lines, Inc.*, *supra*, 90 M.C.C. at 118-119; *Coldway Food Express, Inc.*, *supra*, 87 M.C.C. at 129; *Esley Express, Inc.*, *supra*, 85 M.C.C. at 399-400; *Kenosha Auto Transport Corp.*, *supra*, 80 M.C.C. at 69-72, 77; *Black*, *supra*, 75 M.C.C. at 281-282.

³⁵ *Nigro Freight Lines, Inc.*, *supra*, 90 M.C.C. at 118-119; *Gate City Transport Co.*, *supra*, 87 M.C.C. at 593; *Cortland Fast Freight, Inc.*, *supra*, 60 M.C.C. at 326.

³⁶ *Nigro Freight Lines, Inc.*, *supra*, 90 M.C.C. at 117-119; *Dorn's Transportation, Inc.*, *supra*, 87 M.C.C. at 115; *Esley Express, Inc.*, *supra*, 85 M.C.C. at 399-400; *Black*, *supra*, 75 M.C.C. at 282; *Cortland Fast Freight, Inc.*, *supra*, 60 M.C.C. at 325-326.

³⁷ See *Nigro Freight Lines, Inc.*, *Esley Express, Inc.*, and *Black*, cited in previous note.

B. THE DISTRICT COURT PROPERLY SUSTAINED THE COMMISSION'S
DECISION

On this aspect of the case, appellants (Br., pp. 22-29) focus on differences between the statements of the case by the court and Commission. They assert that, because of these alleged differences, the court in effect substituted a "judicial judgment * * * for an administrative judgment", in violation of the rule of *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88.

At the outset, Judge Wyzanski's opinion clearly refutes any implication that the court misapprehended the proper scope of judicial review. It posed the questions in the case as the validity of the Commission's order in terms of adequacy of findings, substantiality of the underlying evidence, and sufficiency of the findings to support relief (R. 115). The court resolved each of the stated issues in favor of the Commission, emphasizing throughout its reliance upon the Commission's findings and discretion (R. 120-126).

The obvious intent of the district court was, we believe, carried out in its handling of the factual and legal issues involved in finding a violation of Section 5(4). Taking first the alleged divergence in legal rationale, appellants assert (Br., pp. 26-29) that the district court found a violation of Section 5(4), while the Commission found a violation of different prohibitions contained in Sections 5(5) and 5(6). We have already shown, *supra*, pp. 33-34 that there is only one statutory prohibition—the one set out in Section 5(4); that these provisions are not separate and distinct; that the same evidence is material to both; and that Sections 5(5) and 5(6) are supplementary

reiterations of a kind of unlawful control—that achieved through “affiliated” intermediaries—which Section 5(4) itself prohibits. There is no inconsistency, therefore, between finding violation of Section 5(4) directly and finding such violation through use of the “affiliation” subsections.

In any event, both the court and the Commission relied upon both statutory approaches—the direct prohibition of Section 5(4) and the “affiliation” route. The district court held that violation was established by the sum of evidence concerning the activities of and relations between Nelson and Gilbertville Cos., adding up to “purposeful dovetailing for a common set of ends” (R. 122). The court further stated that, while the conclusion “does not * * * require resort to” Sections 5(5) and 5(6), it “is confirmed, and at no juncture contradicted, by the statutory definitions and presumptions” in the latter provisions (R. 123). Similarly, the Commission found that Kenneth Nelson was “affiliated” with Nelson Co. when he purchased Gilbertville Co. and that the statutory presumption of Section 5(5) applied. But the Commission also specifically “affirm[ed] the findings” of Division 4 and the examiner, both of whom had found unlawful common control in violation of Section 5(4) without utilizing the presumption (R. 21), and expressly incorporated Division 4’s report in its order (R. 25).²⁸

²⁸ Minor factual differences alleged (App. B., pp. 22-26) between the court’s statement of the case and the Commission’s obviously would not justify a remand in the absence of a “solid reason” for concluding that the points of difference could have produced a change in the result. *Communist Party v. Sub-*

II

THE COMMISSION 'PROPERLY DENIED THE APPELLANTS' APPLICATION TO MERGE THE COMPANIES FOUND UNDER UNLAWFUL COMMON CONTROL AND PROPERLY DIRECTED DIVESTITURE OF GILBERTVILLE CO.'

After finding that Nelson Co. and Gilbertville Co. were under unlawful common control, the Commission had to pass upon appellants' application to merge, "in effect a request for validation of the existing unlawful control".³⁹ We submit that the Commission properly denied the application and, in order to terminate the unlawful control, properly directed divestiture.

A. DENIAL OF THE APPLICATION TO MERGE WAS A PROPER EXERCISE OF DISCRETION UNDER SECTION 5(2)

"In denying appellants' application to merge, the Commission stated that recently, in *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39, it had affirmed " * * * the views heretofore followed, that law violations are not necessarily a bar to approval of an application, if the public interest will best be served by approval of the transaction presented" (R. 23). The

versive Activities Control Board, 367 U.S. 1, 67. Here the district court did not repudiate any significant finding upon which the Commission itself "purport[ed] to rely" for its conclusions (367 U.S. at 67). It made additional factual statements supporting the same result, including Kenneth Nelson's continued employment by Nelson Co. after purchasing Gilbertville (n. 7, p. 7 *supra*). Some incorrect statements were made by the court (App. Br., p. 24, n. 14), but these were on immaterial matters, and, in any event, the court also quoted and relied upon, the Commission's statement of facts (R. 117-120).

³⁹ *Cortland Fast Freight, Inc.—Purchase—H. J. Korten, Inc.*, 60 M.C.C. 321, 327 (Div. 4).

Commission then quoted an excerpt from the report of Division 4 in this case, which stated that, although in the early days of regulation of motor carriers, "many. * * * transactions under Section 5 were approved, notwithstanding a showing of law violation," "because of the "paramount public interest," "[n]ow * * * a more stringent approach is warranted" (R. 23). On the basis of these statements, appellants (Br., p. 32) claim that the Commission has "renounced" consideration of the "public interest" criteria of Section 5(2), and has adopted a policy of "automatic denial", "solely" because of the violation of Section 5(4). They urge (Br., pp. 29-37) that such a policy is contrary to the Interstate Commerce Act.

1. Appellants are tilting at the windmill of an alleged Commission policy which was never adopted and does not exist. In the *Central of Georgia* case, the Commission expressly rejected an argument by parties protesting the merger (307 I.C.C. at 43) that a violation of Section 5(4) required an automatic denial of an application under Section 5(2). And in this very case, as above noted, the Commission explicitly emphasized that violations of 5(4) "are not necessarily a bar to approval" of the merger (R. 23).

The point made by the Commission in *Central of Georgia*, and reaffirmed here, is that premature control in violation of Section 5(4) is an important element in the "public interest" appraisal of an application to merge: "The public interest is concerned not only with improvements in transportation service, but also with maintenance of respect for and observance of the law" (307 I.C.C. at 43, quoted at R. 22).

The Commission's policy, accordingly, is to give violations of Section 5(4) weight in deciding whether to approve a merger. The ultimate question remains the "public interest," and the merger will be allowed "if, upon consideration of all the facts, it clearly appears that the public interest will be served best by such approval" (*ibid*).

In the present case, the Commission followed its decision in *Central of Georgia* and considered appellants' violation of Section 5(4) in determining whether approval of their merger application would be "consistent with the public interest." This is clear from the Commission's statement that it could find no error in the findings or conclusions of Division 4, or "other basis upon which to arrive at a conclusion different than that reached in the *Central of Georgia* case, supra, or to support a finding that the transaction for which authority is sought would be consistent with the public interest under all the circumstances" (R. 23).⁴⁰

The characterization of this policy as a "more stringent approach" (R. 23) than the one earlier followed is elucidated by the *Central of Georgia* case. There, Division 4 found an unlawful acquisition of control of *Central*, but an application for control was

⁴⁰It is noteworthy that in his dissenting opinion, Commissioner Hutchinson objected to the decision, not because it was an "automatic" denial of the application, but because he would strike the balance differently from the majority: "On the record as a whole I would find the transaction to be consistent with the public interest" (R. 24). Similarly, Commissioner McPherson dissented for the reasons set forth in his dissent in the *Central of Georgia* case, viz., that the benefits to the public "outweigh" the violation of Section 5(4) (307 I.C.C. at 45).

nevertheless approved on the ground it met the "[t]est of consistency with the public interest" from the standpoint of adequacy of service, economy, efficiency, etc. No weight was given the violation of Section 5(4) in making the "public interest" determination. 295 I.C.C. 563, 576." On reconsideration, the Commission discussed the asserted public benefits (307 I.C.C. at 41) but emphasized what the division had ignored, *i.e.*, that the violation of Section 5(4) is a "public interest" factor which militates against approval (307 I.C.C. at 43-44). This means that an applicant has a greater burden to prove that the "public interest" supports his "proposed" merger if he has been guilty of unlawful acquisition of control.

The policy expressed by the Commission in *Central of Georgia* has been reaffirmed in numerous subsequent decisions, aside from the instant case. Thus, about two months after the Commission's ruling below, Division 4 decided *Sellers—Control—Huckabee Transport Corp.*, 80 M.C.C. 429, in which it found a violation of Section 5(4) and denied an application to merge. The division noted that, when there has been a "law violation", there is added to the "numerous factors considered" in determining public interest "the important question" of whether the parties should benefit from their unlawful acts, weighed against "the probable future public benefits" (80 M.C.C. at 448). It denied the merger on the ground

"For a similar approach in an earlier case, see the statements in *Atlas Van-Lines, Inc.—Control and Merger*, 70 M.C.C. 629, 662, that mergers may be approved, "despite unlawful control * * * when it was shown that transactions *otherwise* were consistent with the public interest" (emphasis added).

that "disregard and disrespect for the law" would not be approved, "in the absence of clear and forceful evidence that substantial public benefits would result" (*id.* at 450). See, also, *Houff-Control—Elliott Bros. Trucking Co.*, 80 M.C.C. 637, 650 Comm., "positive proof" of the public interest; *Kenosha Auto Transport Corp.—Control—U.S.A.C. Transport, Inc.*, 85 M.C.C. 731, 736 (Div. 4), "strong affirmative evidence of public benefits"; *Dorn's Transportation, Inc.—Purchase*, 87 M.C.C. 111, 116 (Div. 4), "overriding public interest"; *Nigro Freight Lines, Inc.—Purchase—Coady Trucking Co.*, 90 M.C.C. 113, 121 (Div. 3), "strong evidence" of public interest.

In considering the weight to be given violations of Section 5(4), the Commission takes into account the wilfulness of the violations. Recent cases denying applications because of such violations have distinguished prior approvals (notwithstanding such violations) in which there was "an absence of intent to flout the law or of a deliberate or planned violation" (*Kenosha Auto Transport, supra*, 85 M.C.C. at 736), or "mitigating circumstances * * * such as inexperienced parties without legal advice or unusual questions of law". *Houff, supra*, 80 M.C.C. at 650-651. The Commission has thus granted applications where it found that a prior violation was excused by unawareness of the violation due to "lack of timely and competent legal advice". *E. C. McCormick, Jr.—Control—A.C.E. Transportation Co.*, 80 M.C.C. 401, 414 (Div. 4); or a "good faith" misinterpretation of Section 5, *Taken Bros. Freight Line*,

Inc.—Control—Iowa-Nebr. Transp., 75 M.C.C. 236, 240-241 (Div. 4). However, the Commission has consistently held that there is no room for a claim of innocence when the applicant has previously participated in Section 5 proceedings. *E. g. Von Der Ahe Van Lines, Inc.—Lease and Purchase—Bee-Line*, 87 M.C.C. 53, 60; *Dorn's Transportation, Inc., supra*, 87 M.C.C. at 116; *Kenosha Auto Transport Corp.—Control, supra*, 85 M.C.C. at 736-737; *Houff—Control, supra*, 80 M.C.C. at 654.

2. We submit that this policy of the Commission is a proper implementation of the Interstate Commerce Act. Appellants (Br., p. 31) concede that the Commission may consider violations of Section 5(4) in determining the "fitness" of an applicant as an element of public interest under Section 5(2). In our view, it is clearly proper for the Commission to consider such a violation, not only as it affects the "fitness" of the applicant, but also as it affects the "public interest [in] * * * the maintenance of respect for and the observance of the law" (R. 22).

This Court has repeatedly recognized that the "wisdom and experience" of the Commission and not of the courts, must decide whether a proposed transaction is "consistent with the public interest" (*McLean Trucking Co. v. United States*, 321 U.S. 67, 87-88; *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 188). Reviewing courts are not "the arbiters of the paramount public interest" which is "the business of the Commission" (*United States v. Pierce Auto Lines*, 327, 515, 535, 526). In determining the factors pertinent to "public interest" under Section 5(2), the

Commission is not limited to those set out in the Act (*Schwabacher v. United States*, 334 U.S. 182, 193, *supra*, pp. 23-24). Likewise, the weight to be given the pertinent factors in an appraisal of public interest is for the Commission's "administrative discretion * * * to draw its conclusion from the infinite variety of circumstances which may occur in specific instances" (*Interstate Commerce Commission v. Parker*, 326 U.S. 60, 65). As long as the Commission does not "exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by the evidence, it is not [the Court's] function to upset its order". *McLean Trucking Co. v. United States*, *supra*, 321 U.S. at 88.

The Commission's determination to consider unlawful control an element of "public interest", and to give it weight against approval of a merger, is based upon its clear understanding of the dangers posed by violations of Section 5(4). The evident purpose and effect of such violations is to achieve *de facto* merger without any governmental supervision and then, as the Commission put it, "to present a *fait accompli* for our approval" (R. 22, quoting *Central of Georgia Ry Co. Control*, 307 I.C.C. 39, 43). The Commission pointed out that the Act requires it to pass upon "proposed" mergers or acquisitions of control, *i.e.*, "prior to their consummation" and "including the justness and reasonableness of the terms upon which such control is to be acquired." If legal premature acquisitions were to be countenanced, the Commission's "administration of the statute in the public interest would be seriously hindered, if not defeated" (*id.* at 44).

Appellants dispute this appraisal. They contend (Br., p. 36) that "applicants who have previously violated Section 5(4) are not in any better position because of their violation," that "[i]n no sense is a 'fait accompli' presented" because the Commission still has authority over approval of the merger. But we have already shown (*supra*, pp. 29-31) how changes in a carrier's circumstances during a period of unlawful control plainly can frustrate the statutory purpose of controlling mergers and acquisitions in the public interest.

The Commission's policy is strongly supported by the similar needs experienced by other agencies with authority to approve acquisitions in the public interest. The Federal Communications Commission has issued a public notice that transfer of a broadcasting station license without Commission approval "will be considered as possible grounds both for a disapproval of the transfer application and for the institution of revocation proceedings * * *" (Public Notice 20805, 4 Radio Reg. 342, August 25, 1948). The Civil Aeronautics Board has ruled that "in the absence of exceptional circumstances" it will not consider an application for approval of an acquisition "as long as the action or relationship exists in apparent violation of the Act, whether or not the action or relationship in question would ultimately be found to be consistent with the public interest" (*Sherman, Control and Interlocking Relationships*, 15 C.A.B. 876, 881).

Finally, the reasonableness of the Commission's policy is not impaired by the fact that it may have employed a less stringent policy in the past. In *Fed-*

eral Communications Commission v. WOKO, Inc., 329 U.S. 223, this Court upheld a denial of a renewal of a license to a station which had submitted false reports to the Commission, rejecting an argument that the action was arbitrary because it was "a departure from the course which the Commission has taken in dealing with * * * other [similar] cases" (*id.* at 227-228). The Court held that the Commission was entitled to take more "drastic measures" when its experience showed the need therefor. It stressed that "it is the Commission, not the courts," which is to weigh the violations against the quality of the station's service and "which must be satisfied that the public interest will be served by renewing the license" (*id.* at 229).

3. Turning to the application of the Commission's policy in this case, we submit that the denial of the application to merge Nelson and Gilbertville Cos. was an appropriate exercise of discretion. Indeed, this litigation provides an apt rebuttal to appellants' contention that no applicant is in a "better position" because of prior violation of Section 5(4) (Br., p. 36). The examiner found that the needs and ambitions of the Nelson Co. interests had crystallized into "an overall plan or project to create a larger and more significant motor carrier in the New England-Middle Atlantic area using Nelson as a nucleus" (R. 68-69).⁴² Whether

⁴² The president of Nelson Co., Charles Chlberg, testified that his company's certificate is limited to transportation for the textile industry in the New England area, and, with the movement of textile plants out of the area, Nelson Co. has sought to expand its operations into other areas and commodities. R. 394-395; see also R. 338 and the application in this case, R. 181.

such an enlarged carrier would be in the public interest is, of course, a question which should be determined by the Commission.

The first attempts to enlarge Nelson Co. were submitted to the Commission as "proposed" transactions in compliance with Section 5. In 1953, the Commission denied, as not consistent with the public interest, Nelson Co.'s application to acquire the operating rights of a bankrupt carrier, White's Express, authorized to transport general commodities in parts of New York, New Jersey, Connecticut and Pennsylvania. The Commission found that White's operating rights were dormant and that Nelson Co. had failed to make a showing of "public need" to revitalize those rights since adequate service was being provided by the existing carriers in the area (*L. Nelson & Sons Transport Co.—Purchase—White's Exp.*, 59 M.C.C. 675, 680). A subsequent application by the two principal stockholders in Nelson Co., Charles Chilberg and Clifford Nelson, to acquire Byrnes, Inc., a carrier of general commodities also in the Middle-Atlantic area, was granted by the Commission because the acquisitions would not result in a new unified service, due to the differences in commodities authorized to Nelson Co. and Byrnes (*Charles G. Chilberg and Clifford J. O. Nelson—Control—R. A. Byrnes, Inc.*, MC-F-5749—decision of Division 4, May 15, 1956, pp. 4-5).

The present application finally presented to the Commission Nelson Co.'s "overall plan" in full. A combination of the Byrnes and Gilbertville Co. authorities provides the basis, as the examiner found (R. 67), for "a through general commodity service be-

tween points in Massachusetts, Rhode Island and Connecticut, on the one hand, and, on the other, points as far south as the District of Columbia", as well as an expanded area of service for Nelson's textile carriage. If this application to acquire Gilbertville had been filed in March 1953, when that company was declining, having only one truck, three tractors and four trailers, and a \$40,000 deficit, the Commission would have been presented with the question of the need for such new service, an issue analogous to that presented in *White's Express*. See also p. 30, *supra*. Instead, in the intervening period, Gilbertville was revived with the shifting of funds, efforts, equipment and personnel from Nelson Co., and it rapidly expanded in close relationship with the Nelson and Byrnes companies. In support of the belated application for merger in October 1955, appellants asserted the advantage to the public of combining into one firm the interchanges and other related services accomplished under unlawful common control (R. 180-181). Obviously, if the Commission were to ignore the violation of Section 5(4), appellants would be in a vastly "better position" (Br., p. 36) than they would have been had they submitted the "proposed" acquisition of Gilbertville for approval in 1953.

In his recommended report, the examiner failed to take proper account of the violation when he proposed to grant approval of the merger. He recommended that "[a] finding of unfitness by reason of violations is not warranted" (R. 73), because the violations "appear[ed] to be" the result of "ignorance" or "a degree of carelessness and not wilfulness" (R. 72). The examiner found the merger to be consistent

with the public interest, because competition with existing carriers "is either already an accomplished fact or capable of becoming so even though the present application is denied" (R. 74). He also found that the merger would result in better service and economies of operation (R. 76), while not adversely affecting employees or the "fixed charges" of Nelson Co. (R. 78).

It is obvious that the examiner considered the violation of Section 5(4) only as it affected the "fitness" of the appellants, and never considered that a factor of the public interest is (R. 22) "the maintenance of respect for and the observance of the law." Furthermore, his conclusion that the violations were due to "ignorance" and "carelessness" rather than "wilfulness" was inconsistent with his own finding that "an overall plan or project" to expand Nelson Co.'s operations "was conceived and followed", and is rebutted by the long experience of the appellants in the motor carrier field and in Section 5 proceedings (R. 23, 92-93). Finally, the examiner's conclusion that the merger would be consistent with the public interest was based on factors arising from the illegal relationship between Nelson Co. and Gilbertville Co. Thus, he treated the through-service created by interlining between Gilbertville and Byrnes, developed under unlawful common control as "an accomplished fact" (R. 74), an existing service, rather than as a new service for which a public need had to be shown. And he pointed to the benefits from unifying the service "presently interchanged" (R. 76).

Accordingly, the Division and the full Commission were justified in rejecting the examiner's recommendation and in deciding to deny the application to merge.

They properly gave weight to the finding of unlawful control as a "public interest" factor militating against approval, in accordance with the Commission policy already described. They also correctly rejected any excuse of "ignorance", following the uniform rule that prior participation in Section 5 proceedings establishes awareness of the law, *supra*, pp. 46-47. As to the countervailing public benefit, the Commission has repeatedly held that it will give "no weight whatsoever" to advantages generated by the unlawful operations—here, the interchanges sought to be combined.⁴³ In the absence of any showing of public need, or the inadequacy of existing service, appellants have failed to present evidence of the "overriding public interest" "required to outweigh the violation."

B. THE DIVESTITURE ORDER WAS A PROPER EXERCISE OF THE COMMISSION'S DISCRETION UNDER SECTION 5(7)

We have shown that the Commission properly found the Nelson and Gilbertville Cos. under unlawful common control, and properly decided not to validate this relationship but to disapprove the merger. The Commission was then under a statutory duty to "require [appellants] to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation" (Section 5(7), 49 U.S.C. 5(7)). This broad discretion clearly sustains the

⁴³ *Deaton Truck Line, Inc.—Purchase—Capitol Freight Lines, Inc.*, 70 M.C.C. 355, 360 (Div. 4). *Cortland Fast Freight, Inc.—Purchase—H. J. Kortén, Inc.*, 60 M.C.C. 321, 329 (Div. 4); *Pacific Greyhound Lines—Control and Merger*, 56 M.C.C. 415, 438-439 (Div. 4).

⁴⁴ *Dorn's Transportation, Inc.*, 87 M.C.C. at 116; see also other cases cited *supra*, p. 46.

Commission's requirement of divestiture by the other appellants of their interests in Gilbertville Co.

Appellants concede that the Commission has authority to order divestiture in "an appropriate case" where a violation of Section 5(4) is found (Br., p. 38). But they claim that it cannot be sustained here, because the Commission did not make specific findings that less drastic remedies were explored and found unavailing (Br., pp. 40-43, 46).

Far from being "harsh and inappropriate" (App. Br., p. 41), however, "ordering a divestiture" is "the usual procedure in investigations under section 5(7)" (*Nigro Freight Lines, Inc.—Purchase—Coady Trucking Co.*, 90 M.C.C. 113, 121 (Div. 3)). And it is easy to see why this is so. Violation of Section 5(4) consists of unauthorized acquisition by one carrier of control over another. The straightforward solution is to separate the acquiring carrier from the acquired, to terminate the violation by divestiture. Judge Wyzanski properly stated that "divestiture has a fitness so perfect that the order not merely is obviously a suitable exercise of discretion, but needs no gloss" (R. 125).⁴⁵

⁴⁵ The district court (R. 125) properly relied upon *United States v. du Pont & Co.*, 366 U.S. 316. In that case, the Court noted that under the antitrust laws where the "heart" of a violation is "intercorporate combination and control," "[d]ivestiture or dissolution has traditionally been the remedy" (*id.* at 329) and that it is "a natural remedy" for an unlawful acquisition (*id.* at 328). In the antitrust cases cited by appellants (Br., pp. 41-42) in which divestiture was rejected, the Court explicitly pointed out that no unlawful acquisition was involved in the violations found. See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 603-604; *United States v. National Lead Co.*, 332 U.S. 319, 351-353.

The Commission's "usual" use of this remedy of divestiture is illustrated by numerous Section 5 cases heretofore cited.⁴⁶ It is particularly emphasized by a number of decisions, in which the Commission issued orders directing the parties in terms "to terminate violations" of Section 5(4), which the Commission itself characterized as "divestiture" orders. *Kenosha Auto Transport Corp.—Investigation of Control*, 80 M.C.C. 59, 77-79 (Div. 4); *Black—Investigation of Control*, 75 M.C.C. 275, 282-283 (Div. 4); *Houff—Control—Elliott Bros. Trucking Co.*, 70 M.C.C. 177, 194 (Div. 4), affirmed, 80 M.C.C. 637. The existence of a general administrative policy supporting the remedy of divestiture is also confirmed by the Section 5 cases in which the Commission formulates a remedy other than divestiture; for there the Commission deems it necessary to justify its deviation from the normal divestiture order.⁴⁷

⁴⁶ See cases cited *supra*, p. 38, and notes 28, 30. See also *United States Freight Co.—Investigation of Control*, 39 M.C.C. 623, 641-642; *Greyhound Corp.—Investigation of Control*, 45 M.C.C. 59, 81-82; *Casser—Control—Bingler Vacation Tours, Inc.*, 57 M.C.C. 53, 68.

⁴⁷ Thus, in *Central of Georgia Ry. Control*, 307 I.C.C. 39, the Commission explained the adverse economic effects which would follow if the illegally acquiring carrier "were required immediately to sell all of its interest in Central's stock". On that basis, it permitted the transfer of the stock into a voting trust in which the acquiring carrier had only beneficial interest, but no power to control (pp. 44-45).

On the other hand, in *Nigro Freight Lines, supra*, the Commission rejected the "usual" divestiture remedy on the ground that it was inadequate. The theory of such a remedy, the

Although appellants (Br., p. 46) argue that "a number of effective alternative remedies must have been available" here, they suggest only ~~one~~ example, that the Commission could direct the severance of the "affiliation" found between Kenneth Nelson and Nelson Co. But the finding of "affiliation" was a finding that Kenneth Nelson was acting on behalf of Nelson Co. interests in acquiring and operating Gilbertville Co. See pp. 34-39, *supra*. His connection with Nelson Co., developed on the basis of intangible family ties, could not be effectively severed. Clearly, the only practical way to separate the two companies and end the unlawful common control was to require Kenneth Nelson to divest himself of his stock in Gilbertville Co. This is the usual remedy. In other cases, where violation of Section 5 is based on a finding of acquisition by a person "affiliated" with another carrier, the divestiture order invariably covers the "affiliated person". E.g., *Selfers—Control—Huckabee Transport Corp.*, 80 M.C.C. 429, 450-451, *Kenosha Auto Transport Corp.—Investigation of Control*, 80 M.C.C. 59, 78-79 (Div. 4), *Stacks—Investigation of Control*, 75 M.C.C. 625, 638-639 (Div. 4). Similarly, where there is no specific finding of "affiliation" under Section 5(6), but a common control is found to have been effectuated through an acquisition by an intermediary or "front";

Commission noted, is that the carriers can be separated from each other into independent, lawful operations. But since, in *Nigro* the operations of the acquired carriers in interstate commerce had been illegal from their inception, and were so intertwined with *Nigro* that separation did not appear feasible, the Commission ordered the acquired companies to discontinue all operations in interstate or foreign commerce. 90 M.C.C. at 124.

the divestiture order includes all those respondents who participated in the acquisition. *E.g., Coldway Food Express, Inc.—Control and Merger*, 87 M.C.C. 123, 130-131 (Div. 4); *Black—Investigation of Control*, 75 M.C.C. 275, 281-282 (Div. 4).

In reviewing administrative remedies, the "courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Federal Trade Commission v. Rubberoid Co.*, 343 U.S. 470, 473; *Federal Trade Commission v. Mandel Bros.*, 359 U.S. 385, 392-393. Certainly, the remedy chosen here—one which directly terminated the illegal conduct—cannot fail to meet that test. Divestiture is the obviously appropriate means of dealing with prohibited acquisitions, and the Commission was well within its authority in concluding that it should be adopted in the absence of strong countervailing considerations."

"Appellants contend (Br. 19-21) that there were no adequate findings as to "continuance" of the violation which would justify an order under Section 5(7). Both Division 4 (R. 91, 93) and the Commission (R. 21, 29) expressly found, however, that the violation was continuing. Moreover, Division 4 noted that "no party of record excepts to the examiner's findings that the respondents have effectuated or participated in the effectuation of the control and management of Nelson in a common interest with Gilbertville in violation of section 5(4), and that the violation is continuing" (R. 89) (emphasis added). Appellants object to the examiner's language to the effect that the unlawful common control was "presumably" continuing, but this referred only to the presumption of continuance, at the time of his decision in June 1957, of unlawful control proven as of 1953-1956. In any event, where, as here, the violation is found to have been effectuated through an intermediary, Kenneth Nelson, and there is no evidence of change of circumstances, the continued control of the acquired carrier by such intermediary is sufficient ground for entry of relief under Section 5(7).

Finally, appellants err in asserting surprise, on the ground that the question of "divestiture" had never been argued or suggested in this case prior to the Commission order of June 9, 1959 (Br. 37-38). Before Division 4, as its report states, the protesting carriers and the Commission's Bureau of Inquiry and Compliance expressly contended that the hearing examiner had erred "in failing to recommend a divestiture in view of the findings that section 5(4) had been and is being violated" (R. 87). The division directed appellants "to terminate the violation" of unlawful control—language which, in other cases, has been understood to mean divestiture, *supra*, p. 56. In their arguments before the full Commission on reconsideration, appellants attacked this order on the grounds it "demands they cease violations of the act which are unknown, unlisted and unspecified." (R. 17). The Commission affirmed "the findings and conclusions" of Division 4, and entered "an appropriate order" (R. 23-24), which expressly stated the means by which the violation was to be terminated and the reach of divestiture, *viz.*, divestiture of interest in the stock of Gilbertville Co. by all appellants including Kenneth Nelson (R. 26). On this record, there is no ground for questioning the Commission's exercise of discretion to apply the usual remedy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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OCTOBER 1962.

APPENDIX

National Transportation Policy, 54 Stat. 899 (1940):

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulations of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Interstate Commerce Act § 1(3)(b), as amended, 54 Stat. 899 (1940)

(b) For the purposes of sections 5, 12(1), 20, 204(a)(7), 210, 220, 304(b), 310, and 313 of this Act, where reference is made to control (in referring to a relationship between any person or persons and another person or persons),

such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.

Interstate Commerce Act § 5(2), as amended, 54 Stat. 905 (1940), as amended, 63 Stat. 485 (1949)

(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commis-

sion shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following consider-

ations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Interstate Commerce Act § 5(4), as amended, 54 Stat. 907 (1940)

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

Interstate Commerce Act § 5(5), as amended, 54 Stat. 907 (1940)

(5) For the purposes of this section, but not in anywise limiting the application of the provisions

thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

Interstate Commerce Act § 5(6), as amended, 54 Stat. 908 (1940)

(6) For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

*Interstate Commerce Act § 5(7), as amended, 54 Stat.
908 (1940)*

(7) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitutions for, any other enforcement provisions contained in this part; and with respect to any violation of paragraphs (2) to (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to the part shall apply to such a violation by any other person.

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In the
Supreme Court of The United States

OCTOBER TERM, 1962

No. 40

GILBERTVILLE TRUCKING CO., INC.,
THE L. NELSON & SONS TRANSPORTATION
COMPANY, CHARLES G. CHILBERG, CLIFFORD
J. O. NELSON, GRETA C. CARLSON, AND
KENNETH A. H. NELSON,

Appellants,

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF FOR APPELLANTS

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In the
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OCTOBER TERM, 1962

No. 40

GILBERTVILLE TRUCKING CO., INC.,
THE L. NELSON & SONS TRANSPORTATION
COMPANY, CHARLES G. CHILBERG, CLIFFORD
J. O. NELSON, GRETA C. CARLSON, AND
KENNETH A. H. NELSON,

Appellants,

v.
UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,

Appellees.

REPLY BRIEF FOR APPELLANTS

This is a direct appeal from a final judgment of a three-judge United States District Court for the District of Massachusetts which dismissed appellants' suit to enjoin and set aside certain orders of the Interstate Commerce Commission. The challenged decision of the Commission held that appellants had violated the prohibition expressed in sections 5(4), 5(5), and 5(6) of the Interstate Commerce Act,¹ denied an application for approval pursuant to sec-

¹ Relevant parts of sections 7(c), 8(b), and 10(e) of the Administrative Procedure Act (60 Stat. 241, 242, 243; 5 U.S.C. §§1006(c), 1007(b), 1009(e)), the National Transportation Policy (54 Stat. 899), and sections 5(2), 5(4), 5(5), 5(6), and 5(7) of the Interstate Commerce Act, as amended (54 Stat. 905, 907, 908, 63 Stat. 485; 49 U.S.C. §§5(2), 5(4), 5(5), 5(6) and 5(7)) are set forth as Appendix A to the Brief for Appellants. Those statutes are herein cited by act and section number alone.

tion 5(2) of that Act of a proposed merger of appellants Gilbertville Trucking Co., Inc. ("Gilbertville Co.") and The L. Nelson & Sons Transportation Company ("Nelson Co."), and directed divestiture of the stock of Gilbertville Co., all of which is owned by appellant Kenneth A. H. Nelson ("Kenneth").

Appellees have filed a sixty-page brief citing many cases and various other authorities, but completely ignoring the existence of the Administrative Procedure Act. And they have devoted their argument principally to an attempt to compensate for the weaknesses of the Commission's Report, by trying to supply necessary theories, reasons and grounds of decision which the Commission failed to state.

ARGUMENT

I. A. APPELLEES' ARGUMENTS ARE NOT ADEQUATE SUBSTITUTES FOR THE BASIC FINDINGS, REASONING AND SUBSTANTIAL EVIDENCE REQUIRED TO SUPPORT THE COMMISSION'S DECISION.

Appellants demonstrated in their principal Brief (pp. 13-21, 47-54) that the Commission's Report failed to satisfy minimum standards established by this Court and by the Administrative Procedure Act both (1) in that the Report lacked basic findings and reasoning required to support and articulate the Commission's determination that appellants were guilty of a violation of law and its apparent determination that such violation was continuing and (2) in that the only statements in the Report which even suggest any conduct by appellants other than obviously innocent or irrelevant conduct lack the required support by substantial evidence on the whole record.

1. Appellees have used a "shotgun" technique in trying to excuse the lack of necessary basic findings and rea-

soning in the Commission's Report. Simultaneously, they (a) ask this Court to hold that two findings which the Commission made were misstatements, (b) rely upon statements in the Examiner's Proposed Report in lieu of the findings in the Commission's Report, (c) claim that findings are unnecessary,² and (d) attempt to supply in their Brief one of the essential findings which the Commission's Report lacks.³ Appellees' latter two points, having been noted in the margin, do not deserve further discussion.

a. Confronted with two findings of fact by the Commission which were favorable to appellants, appellees tell this Court that both of those findings were erroneous—and they consider one to have been a deliberate misstatement intended to be facetious or sarcastic. (Appellees' Br. pp. 7-8, nn. 6, 7) However, the findings in question were clearly correct. *First*, the Commission's express finding that the

² In support of the Commission's having based its decision upon "all facts of record", appellees assert (Br. p. 36) that "these facts themselves constitute the 'adequate subsidiary findings' (*Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-194) required to support the decision. No intervening findings were appropriate or necessary." But appellees' assertion that basic findings are not necessary is not supported by the *Minneapolis* case. In that case, this Court excused the Commission from its duty to make clear basic findings of fact and statements of reasons only as to certain irrelevant contentions of an intervenor—"contentions that are so collateral or immaterial that the law did not require specific findings upon them." (361 U.S. at 193)

³ Obviously because appellants demonstrated (Br. pp. 14-19) that the Commission's finding that Kenneth "was affiliated" with Nelson Co. was fatally unsupported because the Report contained no basic finding of the "relationship" necessary to invoke section 5(6), appellees have labeled Kenneth as an "intermediary". But the Commission made no such finding, and, even if it had, it would have been devoid of support, for there is no finding or evidence that would even suggest—much less prove—such an agency "relationship" as of the time the Commission specified—when Kenneth "purchased the stock of Gilbertville" (R. 21).

connection between Kenneth and Nelson Co. as, respectively, free lance tariff consultant and client had ended by March 1, 1953 (R. 19), which was a Sunday, impairs appellees' argument because it means that Kenneth had severed all connections with Nelson Co. before he became connected in any way with the operations of Gilbertville Co.; as appellees admit (Appellees' Br. p. 6), Kenneth had sold his stock and resigned his corporate offices in Nelson Co. on September 22, 1951; as the Commission found and the contract itself confirms (R. 667), Kenneth's contract to buy Gilbertville Co.'s stock was dated March 2, 1953; it was not until March 3, 1953 that the contract was executed (R. 670) and Kenneth deposited escrow money and took over the operation of Gilbertville Co. (R. 230);⁴ and the stock of Gilbertville Co. was not actually transferred until July 24, 1953 (R. 308). Appellees' sole basis for asking this Court to overrule the Commission's finding that Kenneth's tariff consultant activities had ended by March 1, 1953 is one ambiguous guess by accountant Solomon.⁵

Although the contract provided for financial adjustment "as of February 28, or March 1, 1953 (R. 668-69), obviously the seller would not have turned over the operations of Gilbertville Co. until after the contract was signed and the money was deposited on March 3, 1953. Moreover, when the Bureau attorney asked, "Then he [Kenneth] took the operation [of Gilbertville] over before he purchased it, is that correct?", Mr. Solomon answered, "No. He deposited escrow funds *at that time*, on March 3, 1953, I believe." (R. 230) (Emphasis added.)

When asked whether all Kenneth's 1953 income as a tariff consultant was "received for services performed prior to his acquisition Gilbertville", Mr. Solomon guessed "Some of that would have to be after." (R. 361) That the statement was a guess is obvious from the phraseology ("would have to be"), from Mr. Solomon's admitted lack of knowledge and confusion about the subject (R. 358-61) and from the fact that Mr. Solomon's only source of information was income tax returns (which, as the Examiner (R. 281), Mr. Solomon (R. 282) and Judge Wyzanski Stenographic Record of Hearing before Three-Judge Court [here-

Appellees emphasize that Mr. Solomon was a witness called by appellants, but that does not make him either omniscient or infallible.⁶ Second, appellees also ask this Court to hold that the Commission did not mean the words "free lance" in the finding that Kenneth was a "free lance" tariff consultant" (R. 19) because the Commission was quoting the same Mr. Solomon. However, the obvious reason why "free lance" appears in quotation marks is that it is a colloquial expression. Moreover, that Kenneth was an independent contractor was proved by other uncontradicted testimony by Mr. Solomon which in no way depends upon the phrase "free lance" and is also implied by the term "consultant", which the Commission did not put in quotation marks.⁷

in after cited as "Court Hearing"], p. 34) have all noted and Commission counsel conceded in the District Court (*ibid.*), in no way indicate *when* during a year income was received).

Moreover, Mr. Solomon was apparently saying "Some of that [money] would have to be [received] after", not "Some of that [money] would have to be [received for services performed] after". Because Kenneth, like other independent professionals, received his consulting fees when he rendered statements, not when he rendered services (R. 242-43, 276-82), there is no necessary relationship between the amount of fees received in 1953 and the extent of services in that year. Inasmuch as there is no evidence or finding that Kenneth received any fees in 1951, although he was a consultant from September through December 1951, Kenneth may well have been paid for 1951 in 1952 and for much of 1952 in 1953.

⁶ For example, he inadvertantly gave erroneous testimony to the effect that Howard Chibberg was a director of Nelson Co. (R. 253-54). As Mr. Solomon himself said, he had "a few hundred accounts; and, boy, this is pretty hard." (R. 286).

⁷ Mr. Solomon, a public accountant (R. 184) who was an independent contractor (R. 223-24), described Kenneth as "an independent, just the same as myself" (R. 276) and specifically denied that Kenneth was an employee of Nelson Co. (R. 242).

⁸ See, e.g., *State v. E. J. Doyle & Co.*, 96 Atl. 605, 610 (R. I. 1916); *Gulf & Southern Transportation Co., Inc.—Extension—Century, Florida*, 71 M.C.C. 1, 2 (1957). See also R. 104.

b. Tacitly admitting that the Commission's findings were insufficient, appellees have based their Brief on *some* findings, inferences and comments which they have carefully selected from the Examiner's Proposed Report.⁹ However, appellees' reliance upon the Examiner's Proposed Report is not justified, even though (as appellees repeatedly state) appellants did not take formal exceptions to the Examiner's Proposed Report, which concluded that the investigation should be terminated and section 5(2) approval should be granted, for the Commission's Report is based upon the Commission's own findings and inferences as to what "[t]he evidence shows". (R. 19)¹⁰ More-

The Commission's statement that at an "office at one of Nelson's terminals . . . [Kenneth] served only Nelson Co. is not inconsistent with Kenneth's having been a free lance consultant holding himself out to do—and even doing—tariff work for other clients elsewhere. Nor is there any evidence that Kenneth had no other clients. The only evidence is that during 1952 and 1953 Kenneth's only income as a tariff consultant was from Nelson Co. (R. 358-60); it is perfectly possible that Kenneth had other clients but (because of contingent-fee arrangements or for other reasons) he was not paid by such other clients until after 1953 or was not paid by them at all. As Commission counsel conceded, the Bureau had the burden of proving that Kenneth had no other clients, if that were so (R. 105-06), and the Bureau did not sustain that burden.

⁹ Some of these selections from the Examiner's Proposed Report have been not only drastically edited, but also completely divorced from their original context. For example, the scrap of quotation in appellees' footnote 10 (Br. p. 11) was carved out of the Examiner's discussion of the contention that Nelson Co. sacrificed some of its traffic to Gilbertville Co.—a contention that the Examiner rejected. (R. 68; see R. 75-76)

¹⁰ As Commission counsel told the District Court, the factual statements in the Commission's Report (R. 19-21) "are the findings of fact of the Commission, there is no doubt of it." (Court Hearing, p. 41) It is clear that the Commission is the primary fact-finder. See Administrative Procedure Act § 8(a); *Federal Communications Commission v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364; 2 Davis, Administrative Law § 10.04, at 26 (1958). On appellants' petition the Commission reconsidered Division 4's

over, appellees in their Brief have distorted those findings by disregarding two essential conclusions of the Examiner which qualify and modify everything else the Examiner said: that as to whether or not appellants were guilty of a violation of law the case was on "the borderline" (R. 64) and that "there is no evidence of extensive or flagrant violations of either the act or the regulations. The violations shown . . . appear to be the result in some cases of ignorance of the requirements; and in others of a degree of carelessness and not willfulness." (R. 72).

2. Apparently trying to compensate for the lack of substantial evidence to support certain statements in the Commission's decision, appellees have (a) cited a few additional pages of testimony, (b) claimed that it is immaterial that the appellants' practices were legitimate, and (c) made more unsupported and exaggerated statements.¹¹

a. Appellees (Br. p. 37 n. 27) have cited four bits of evidence not cited by the District Court (R. 119), which appellees claim support two of the nine statements which appel-

decision (R. 13); subsequently, on appellants' petition of August 17, 1959, the Commission reexamined and refused to reopen its decision (R. 27-28). Having attacked the findings of fact in the Commission's Report in their petition of August 17, 1959, in the District Court, and in their notice of appeal to and jurisdictional papers in this Court, appellants are in no way precluded from continuing that attack.

¹¹ Appellees' Brief (pp. 38-39) also contains citations to other cases where the Commission has found a violation of law, but the facts of those cases are strikingly different from the facts of the present case. For example, in *Nigr. Freight Lines, Inc. — Purchase — Coady Trucking Co.*, 90 M.C.C. 113 (1962), upon which appellees rely heavily, some 98% of Coady's freight was interlined with Nigro, whereas only a very small percentage of the freight that either carries is interlined between Nelson Co. and Gilbertville Co. (see Appellants' Brief, p. 50). Also, Gilbertville Co. pays fair rental for equipment it leases (see R. 234), but equipment was leased by Nigro at a nominal rate of one dollar per year.

lants (Br. pp. 47-54) demonstrated were not supported by substantial evidence on the whole record, but two of these bits of evidence are obviously irrelevant and a third was discussed in appellants' principal Brief.¹² The fourth citation is to R. 558-60, part of investigator Shea's story about a visit to Newton, Massachusetts, where both Nelson Co. and Gilbertville Co. operate terminal facilities (R. 20). Answering a question as to what he saw and heard, Mr. Shea said only that he "saw Mr. Clifford Nelson hire a driver" (apparently Mr. Shea heard nothing) (R. 558); some time later Mr. Shea saw that driver driving a Gilbertville Co. vehicle (R. 559). Plainly that testimony is not substantial evidence of any unlawful conduct.¹³

b. Appellees say that it is futile for appellants to show, as they have shown (Appellants' Br. pp. 48-54), that the factual statements in the Report which are not obviously innocent are exaggerations without any substantial basis in the whole record, for "justifications of separate practices can [not] detract significantly from the Commission's determination that the entire picture demonstrates the ille-

¹² R. 541-43 is cited by appellees as proof that "the same driver and vehicle will perform the through movement" (R. 20), but the testimony only describes a unit leased to Gilbertville Co., with placards displayed to show the lease. The evidence at R. 514-15, which appellees cite for the same purpose, was discussed in appellants' principal Brief (pp. 49-50, 51). R. 539-40 is cited in connection with alleged "managerial direction [of each company] from officers of the other", but the cited testimony is patently irrelevant.

¹³ Mr. Shea also related that after he (Shea) had complained to Clifford Nelson that there were no papers covering a Gilbertville Co. shipment, Mr. Nelson reported the problem by telephone to someone who could and did rectify the situation. (R. 559-60) Inasmuch as Mr. Shea chose to speak to Clifford Nelson about a Gilbertville Co. matter, the only thing Mr. Nelson could properly do was to relay the information, as he did. In short, all the material evidence in connection with alleged "managerial direction" is discussed in appellants' Brief (pp. 52-53).

gality" (Appellees' Br. p. 37). In other words, appellees contend that reference to enough instances of innocent conduct can justify a conclusion of illegality. Such a rule would make vagueness a virtue. But it is clear that where (as in the present case) an agency "did not rest its order on any single finding of fault standing alone but on the sum of its findings" and a reviewing court finds even a single finding "infected with error, the [agency's] . . . ultimate conclusion cannot stand and the case must go back . . . for further study." *Carey v. Civil Aeronautics Board*, 275 F.2d 518, 522 (1st Cir. 1960). It is for the Commission, not this Court, to "reconsider its original consideration in the light of the record as freed from the . . . [error] that now beclouds it." *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115; see *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626, 634.

c. Appellees' Brief not only reiterates the Commission's unsupported statements; it makes additional unsupported statements of its own¹⁴ and adds unsupported embellish-

¹⁴ For example, appellees (Br. p. 35) assert, without authority, that "computing the actual length of the companies' respective hauls" (instead of using established percentages (see Appellants' Brief p. 50)) is "the usual trade practice" with respect to division of revenues from interlined shipments. The following, however, were the findings of an examiner of the Commission as the result of an extensive investigation of divisions of revenue on interlined shipments between motor carriers: "Stated as a general rule costs are but one of many elements entering into the establishment of reasonable divisions. *The industry generally uses some or all of the criteria hereinafter enumerated.* The volume and direction of movement of the traffic, financial responsibility of the carrier or carriers for interline settlements and of loss, damage and overcharge claims, effect of competition, the amount of service, relative lengths of haul, whether the joint route is reasonable direct or circuitous, terrain and density of vehicular traffic over the routes, the size and type of movement, who controls the traffic, and simplicity of application. . . . [A certain carrier] has divisions with three [other carriers] . . . based on a percentage of the total through revenues. . . . *This method of determining a basis for divisions is frequently used and*

ments to the evidence.¹⁵

- B. THAT THE DISTRICT COURT PURPORTED TO AFFIRM THE COMMISSION DOES NOT JUSTIFY THE DISTRICT COURT'S DECIDING THE CASE UPON FINDINGS OF FACT AND A LEGAL THEORY DIFFERENT FROM THOSE RELIED UPON BY THE COMMISSION.

Although appellees (Br. pp. 41-42, n.38) admit that the District Court's decision assumed facts different from those found by the Commission, they attempt to justify the District Court's having done so by pointing out that the errors were all in appellees' favor, "supporting the same result". However, that the District Court reached the same result as the Commission clearly does not excuse its reliance upon

acceptable." *Divisions—Textiles, South Carolina to the East*, No. 33374 (August 31, 1962), sheets 10-11, 21. (Emphasis added.)

¹⁵ For example, the purported summary of evidence in appellees' footnote 11 (Br. p. 12) is exaggerated and distorted. Although appellees refer to "two Nelson Co. employees . . . and . . . others on the intercom", it is quite clear in the record that only a *total* of two employees (a Mr. Seiferth and a Mrs. Edwards) were involved. (R. 529-34; see Appellants' Br. pp. 52-53). And, although appellees refer to "a Nelson Co. teletype message", the teletype machine was one of the facilities used by both Nelson Co. and Gilbertville Co. (R. 20, 413-44, 498, 626), and there is not a single shred of evidence as to whose teletype message the particular one in question was. The evidence with respect to the two other incidents mentioned in appellees' footnote 11 shows (1) that, after Kenneth had torn off and destroyed some used teletype tape which had grown "two or three yards" long and was spilling out of the machine onto the floor, Mr. Shea demanded the tape over and over again, but Kenneth could not un-destroy it (R. 531-32); and (2) that Clifford Nelson (who had been away when the investigators arrived), in Mr. Shea's words, "could not explain" when Mr. Shea asked him to explain why Kenneth "was directing the operations of the L. Nelson & Sons Company's business"—a question as unanswerable as the legendary "Have you stopped beating your wife yet?" (R. 537-38).

different facts. As this Court held in *Securities and Exchange Commission v. Chenery Corp.*, 338 U.S. 80, 88, "[f]or purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."

Appellees also rely upon *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, where this Court held that a reviewing court was not required to reverse an administrative agency because one of the agency's subsidiary findings was infected with error unless "there were a solid reason to believe that without that subsidiary finding the agency would not have arrived at the conclusion at which it did arrive." (*Id.* at 67) But, although appellees characterize the District Court's erroneous findings of fact as "on immaterial matters", they plainly were not immaterial and—as is even more important—the District Court plainly did not regard them as "immaterial". Whereas in the *Communist Party* case the Board, in the summaries of its modified reports, did not even refer to the finding in question, the District Court featured its erroneous findings in its "syllabus". Moreover, the District Court's different and erroneous findings appeared to show connections between Kenneth and Gilbertville Co. on the one hand and Nelson Co. on the other (see Appellants' Br. pp. 24-26) which, if they had actually existed, would have been most significant. And the District Court's erroneous assumption as to the burden of proof—its implicit holding that appellants were guilty of a violation of law because they were "not shown" to be innocent—plainly was the keystone of the District Court's whole Opinion and its conclusions.

Appellees apparently concede that a reviewing court may not "affirm" the Commission on a legal theory differ-

ent from that used by the Commission, but they offer two mutually inconsistent arguments to justify the District Court's action: first, that the prohibition of sections 5(5) and 5(6) and the prohibition of section 5(4) are the same; and, second, that the Commission's holding (violation of the prohibition of sections 5(5) and 5(6)) was an alternative holding of the District Court and the District Court's holding (violation of the prohibition of section 5(4)) was an alternative holding of the Commission.

Appellees' first argument is unsound because it is built upon their disingenuous assertion that "there is only one statutory prohibition—that set forth in Section 5(4)" (Appellees' Br. pp. 33, 40). In making that assertion appellees rely upon the fact that, as a drafting technique, Congress expressed the prohibition of sections 5(5) and 5(6) in terms of a conclusive presumption of violation of section 5(4)¹⁶ and ignore the statements in the congressional reports and by the draftsmen of the respective provisions that the prohibition of sections 5(5) and 5(6) is necessary in addition to the prohibition of section 5(4) (see Appellants' Br. pp. 27-29). Obviously Congress did not believe sections 5(5) and 5(6) were redundant, and they are not. For example, the prohibition of sections 5(5) and 5(6)—which (insofar as here relevant) forbids only a certain kind of "transaction" by a person having a certain kind of "relationship" to a carrier—raises unique questions of basic and ultimate

¹⁶ Presumably appellees would similarly argue that (1) a federal employee's failing to account for public money which he receives, (2) a private person's knowingly receiving from a clerk of a federal court money belonging in the registry of the court and (3) a dispersing officer's requiring a federal employee to give a receipt for an amount greater than the employee actually receives are all the same because all three crimes are by statute defined as embezzlement. See 18 U.S.C. §§ 643, 647, 652.

fact which appellees have also ignored.¹⁷ The grounds upon which the District Court reached its ultimate conclusion of "control or management in a common interest" (and which appellees urge in this Court) are no more the same as "the conclusive presumption of section 5(5)" upon which the Commission relied (R. 21) than were the other grounds for concluding that the reorganization was "fair and equitable" urged upon this Court in *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, the same as the judge-made rules of equity upon which the SEC had erroneously relied (see 318 U.S. at 93-94).

Appellees' "alternative holding" argument is inconsistent with the very language of the respective opinions. The Commission's sole ground of decision—the ultimate finding "that Kenneth Nelson was affiliated with Nelson within the meaning [or "definition"] of section 5(6) at the time he purchased the stock of Gilbertville" and "the conclusive presumption of section 5(5)" (R. 21) was expressly rejected by the District Court when it stated that its "reasoning does not . . . require resort to any legislatively enacted definitions or presumptions." (R. 123)¹⁸. Appellees' contention that the Commission adopted or incorporate by reference the basic findings and ground of decision

¹⁷ Although section 5(5) forbids a "transaction" only if the requisite "relationship" exists at the time of the "transaction", and although the Commission's ultimate finding was that "Kenneth Nelson was affiliated with Nelson . . . at the time he purchased the stock of Gilbertville" (R. 21) (Emphasis added.), appellees (Br. p. 36) claim that "affiliation" is proved by Kenneth's management of Gilbertville Co. (necessarily after the crucial time) and other "events subsequent to the purchase".

¹⁸ By no stretch of the imagination can an alternative holding be found in the appended comment (without any finding of "affiliation" or "relationship" or any reasoning or discussion) that "it is meet to observe that the reasoning . . . is confirmed, and at no juncture contradicted, by" quoting the full text of sections 5(5), 5(6) and 1(3)(b). (R. 123-24) (Emphasis added.)

of Division 4 is equally unsound. The Commission's Report was substituted, on reconsideration, for Division 4's Prior Report and is a self-sufficient entity, containing, for example, a new recitation of facts which in part duplicates and in part differs from Division 4's recitation; the Commission's Report only purported to "affirm" the ultimate findings of Division 4 and the Examiner which the Commission paraphrased.¹⁹ In fact, the one portion of Division 4's decision which the Commission did "adopt" (concerning the application proceeding) was incorporated by quotation at length.

II. APPELLEES' ATTEMPT TO JUSTIFY THE COMMISSION'S DENIAL OF THE APPLICATION FOR MERGER APPROVAL IS ADDRESSED TO POLICIES NOT CONSIDERED BY THE COMMISSION IN THE PRESENT CASE.

The record contained substantial evidence (see, e.g., R. 319-26, 393-94) that the merger of Gilbertville Co. and Nelson Co. would be in the public interest, and the Examiner found that it would be: Comparing the situation existing at the time of the hearing with the situation that would exist as a result of the proposed merger, he found that resulting economies would produce substantial savings, that transportation services would be improved by elimina-

¹⁹ The Commission affirmed the prior decisions only as to their conclusions stated in statutory language: "we affirm the findings . . . that the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing in violation of section 5(4)" (R. 21). (Emphasis added.) Moreover, read in context, the Commission's recitation of affirmance is simply the third step of the Commission's own conclusion—that it found Kenneth "affiliated" as defined in section 5(6), wherefore "the conclusive presumption of section 5(5) applies", wherefore the Commission found what section 5(5) conclusively presumes, a violation of section 5(4).

tion of gateway observance problems and by establishment of a new terminal at Springfield and that claim services and safety would be enhanced (R. 76); and he further found that the merger would not be harmful to competition (R. 74-76) and would not adversely affect employees (R. 78) and, on the basis of his personal observation of the individual applicants in the hearing before him, he found that the applicants were not unfit. (R. 72-73). Yet it is obvious on the face of the Commission's Report that, in denying the section 5(2) merger application, the Commission considered nothing but the fact that a "law violation" had been found. (R. 23)

Appellants have shown (Br. pp. 29-37) that the Commission erred by thus automatically denying the merger application. But, according to appellees (Br. p. 43), appellants are "tilting at the windmill of an alleged Commission policy which was never adopted and does not exist." Perhaps appellees' metaphor is not entirely inappropriate, for it seems that appellants might well have been somewhat quixotic in believing that there was any established policy underlying the Commission's denial of the section 5(2) application in the present case, and certainly appellees' argument on this issue goes around and around very much like a windmill.

Appellees admit that the Commission's denial of the section 5(2) application in the present case was based upon a new policy, but they insist (1) that the new policy was first formulated in *Central of Georgia R.R. Co. Control*, 307 I.C.C. 39 (November 14, 1958) and (2) that the policy of *Central of Georgia* involves a weighing of various factors to determine the public interest and represents an innovation only in that a section 5(4) violation is considered relevant to one factor ("the maintenance of respect for

and the observance of the law") which weighs heavily in a determination of the public interest.²⁰ Much of appellees' Brief (pp. 28-31, 42-50) is devoted to explanation and justification of the policy of *Central of Georgia* (including and in part supported by citations to a number of Commission decisions) based on what "can" or "may" happen in specific cases.

But appellees' elaborate explanation and justification of the policy of *Central of Georgia* (as well as that policy itself) is wholly irrelevant in the present case. The "more stringent approach" adopted in the present case by Division 4 in its Prior Report of February 26, 1958 was not, and could not have been, based on the *Central of Georgia* case, for the Prior Report preceded the *Central of Georgia* decision by more than eight months. Moreover, when the Commission, in deciding the present case, adopted the policy heralded by Division 4 (by quoting at length Division 4's statement thereof), the Commission indicated by explicit language that it was consciously departing from the policy of *Central of Georgia*.²¹

Unquestionably the "approach" adopted in the present case was automatic denial of a section 5(2) application

²⁰ Yet this "new" policy explained by Appellees' Brief is virtually identical to the well-established "fitness" doctrine (see Appellants' Brief pp. 30-31); indeed, it appears to be the old "fitness" doctrine clothed in a new, fancier vocabulary. In any event, be it new or old, the policy which appellees describe in their Brief certainly is not the approach "more stringent" than "the views heretofore followed" (R. 23) which the Commission adopted in the present case.

²¹ The Commission, in its Report in the present case, first specifically stated that it had "affirmed," in the *Central of Georgia* case, "the views heretofore followed", and then declared (by incorporating part of Division 4's Prior Report), "Now, after more than 20 years of regulatory experience, a more stringent approach is warranted." (R. 23) (Emphasis added.)

solely because a "law violation" had been found. Appellants' application was so denied, and logically only a policy of automatic denial could be "a more stringent approach" than a policy of approving a section 5(2) application, "notwithstanding a showing of law violation, because the paramount public interest warranted approval." (R. 23) "That 'approach' or policy of automatic denial did exist at least in the present case even if it was never invoked again."²² And it is only the Commission's denial of appellants' section 5(2) application, and the "approach" or policy upon which that denial was based, which is an issue in the present case. Neither the validity of the policy appellees expound in their Brief nor the validity of earlier or later policies is at issue.

Appellees claim that the Commission's refusal to distinguish between a willful and an innocent "law violation" was justified by "the uniform rule that prior participation in Section 5 proceedings establishes awareness of the law" (Appellees' Br. p. 54) and because "there is no room for a claim of innocence when the applicant has previously participated in Section 5 proceedings." (Appellees' Br. p. 47) However, no such rule could be applied to Kenneth, who was not found to have participated in any section 5 proceeding prior to the present case; and the only section 5 proceeding to which the Commission referred (*Charles G. Chilberg et al. — Control — R. A. Byrnes, Inc.*) was not commenced until long after March of 1953, when the alleged

²² Indeed, inasmuch as only four of the eleven Commissioners concurred in that "approach", it is very possible that it was never used again. Four Commissioners dissented (one from Division 4's decision and three from the Commission's), one concurred, and two never participated.

violation of law in the present case occurred.²³ Moreover, since even someone familiar with section 5(2) cannot be expected to predict sophisticated applications of sections 5(5) and 5(6) (see Appellants' Br. p. 33 n. 20), and since the Examiner found as a fact that in the present case appellants were not willful, appellees' asserted irrebuttable presumption (that no violation by a person who has participated in section 5 proceedings can be innocent) is plainly arbitrary and irrational. See, e.g., *Secretary of Agriculture v. United States*, 347 U.S. 645, 652-53; *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626, 634; cf. *Slochower v. Board of Higher Education*, 350 U.S. 551; *Wieman v. Updegraff*, 344 U.S. 183; *Tot v. United States*, 319 U.S. 463.

Appellees attempt to explain the Commission's failure to consider the factors which indicated that the proposed merger was in the public interest (and which were the bases of the Examiner's conclusion that the merger should be approved) by reference to an alleged rule that the Commission "will give no weight whatsoever" to advantages generated by the unlawful operations" (Appellees' Br. pp.

²³ Appellees dwell at length (e.g., Br. pp. 50-52) on a supposed "plan" of Nelson Co. to create a larger motor carrier. It is certainly true, and quite natural, that Nelson Co., a carrier serving the textile industry, sought to follow its customers when the textile plants moved and therefore sought to acquire rights to the south of its territory. (R. 394-95) After the adverse decision, on grounds of dormancy, in *L. Nelson & Sons Transport Co.—Purchase—White's Express*, 59 M.C.C. 675 (December 22, 1953), Nelson Co.'s principal stockholders acquired, with approval of the Commission in 1956, the Byrnes rights. But there is no evidence, and the Commission never even suggested, that Gilbertville Co. was a part of any such plan. Indeed, Kenneth purchased Gilbertville Co. long before the *White's Express* decision, and the decision in the *Byrnes* case came in 1956, long after Gilbertville Co. and Nelson Co. filed their section 5(2) application and only a short time before the Examiner's hearing in the present case.

22, 50-54). However, even if that principle were a sufficient excuse for the Commission to disregard the mandatory considerations of section 5(2)(c), the policy of section 5, and the National Transportation Policy (see Appellants' Br. pp. 29-37), that principle has no application to the present case. The factors the Examiner recognized were all prospective economies and advantages over the then-existing operations which only merger would make possible (R. 76); none of those economies or advantages was in any sense a product of the alleged violation of law.

III. APPELLEES OFFER NO EXCUSE FOR THE COMMISSION'S FAILURE TO INDICATE WHETHER AND WHY IT EXERCISED ITS DISCRETION BY ORDERING THE HARSH REMEDY OF DIVESTITURE.

Appellees (Br. pp. 23, 55-56) attempt to justify the divestiture order by arguing that "[t]he straightforward solution is to separate the acquiring carrier from the acquired" and by referring to antitrust cases involving "intercorporate combination". But in the present case the Commission did not find that the corporations had been combined or intertwined but only that they were linked through the alleged "affiliate", Kenneth. Therefore, as appellants have shown (Br. p. 46 n. 32), an injunction of Kenneth's "affiliation" with Nelson Co. and or of the alleged common control or management, like that in Division 4's order,²⁴ should

²⁴ Appellees (Br. pp. 56, 59) cannot conceivably mean to suggest that Division 4's order directing appellants "to terminate the violation" (R. 94) required Kenneth to divest himself of his Gilbertville Co. stock. Such a construction of the language of Division 4's order would be unreasonable in any circumstances and would be absurd in light of the inclusion of all of the operative paragraphs of Division 4's order in the Commission's order (R. 25-26) in addition to the paragraph directing divestiture. The three cases cited by appellees (Br. p. 56), *Kenosha Auto Transport Corp.—Investigation of*

be quite sufficient and divestiture could not be (in the language of section 5(7)) "necessary" to separate the carriers and "prevent continuance of such violation."

Appellees also suggest (Br. p. 57) that the divestiture order was "necessary" because Kenneth's "connection with Nelson Co., developed on the basis of intangible family ties, could not be effectively severed." However, elsewhere in their Brief (pp. 37-38) appellees insist that the Commission did not find "affiliation" solely because of blood relationship, and that position is confirmed by the Commission's ruling in June of 1954 that

"the holding of stock by the stockholders of [Nelson Co.] and by their brother of the controlling stock in Gilbertville Trucking Co., Inc., will not result in common control of the operations and will not bring about an improper competitive situation." (R. 686-87)

Moreover, whether or not divestiture is "necessary" and whether or not an injunctive order (or some other alterna-

Control, 80 M.C.C. 59, 77-79 (Div. 4, 1959); *Black—Investigation of Control*, 75 M.C.C. 275, 282-283 (Div. 4, 1958); *Houff—Control—Elliott Bros. Trucking Co.*, 70 M.C.C. 177, 194 (Div. 4, 1956), affirmed, 80 M.C.C. 637 (1959), do not suggest that a Commission order "to terminate" a violation, like Division 4's order in the present case, has ever been considered equivalent to an order to dispose of stock. At most, those cases indicate that a violation can be terminated, in whole or part, through a divestiture order, which is hardly a remarkable proposition.

Cf. *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), affirmed, 259 F.2d 524 (2d Cir. 1958) ("[I]ssuance of the injunction as hereinbefore directed constitutes an appropriate remedy so that divestiture is not necessary."); *United States v. General Electric Co.*, 115 F. Supp. 835, 871 (D.N.J. 1953) ("The violations of the antitrust act which General Electric and the other defendants were found to have committed can be eliminated by means of the other provisions of the judgment. . . . As divestiture of General Electric is not necessary to foster competition, the Government's request therefor will be denied.")

tive)²⁶ would be effective are decisions to be made by the Commission, in whom Congress vested discretion, not by this Court, and to be explained by the Commission in its Report, not by appellees' counsel in their Brief.²⁷ But the Commission's Report—and, indeed, the whole record (whether a divestiture order should be entered never hav-

²⁶ A great number and variety of other alternatives might be used. See, e.g., *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39 (1958) (voting trust); *Nigro Freight Lines, Inc.—Purchase—Coady Trucking Co.*, 90 M.C.C. 113 (1962) (order barring operations in interstate commerce by two of three carriers involved); cf. *Salzberg v. United States*, 176 F. Supp. 867 (S.D.N.Y. 1959) (purchase approval granted subject to condition). The Commission, in formulating a remedial order, certainly has all of the flexibility and range of choice that would be open to a court of equity. See Appellants' Br pp. 45-46.

²⁷ The mere fact that the Commission entered the order is not enough. The mandatory provisions of section 8(b) of the Administrative Procedure Act require that "[a]ll decisions . . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." (Emphasis added.) Even if divestiture were (as appellees call it) the "usual" remedy, neither that fact nor any authority cited by appellees excuses the Commission from compliance with section 8(b). As this Court said in *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 392, "One cannot generalize as to the proper scope of these orders. It depends upon the facts of each case". There is no substitute for the Commission's consideration of and judgment upon the necessity for divestiture in this case and the Commission's explanation thereof.

ing been argued or considered as an issue in the case²⁸)—remains devoid not only of any explanation as to why divestiture was ordered, but also of any indication that the Commission did in fact exercise discretion in ordering divestiture.

CONCLUSION

For the reasons stated herein and in their principal Brief, appellants respectfully submit that the judgment of the District Court should be reversed.

Respectfully submitted,

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²⁸ Appellees' statement (Br. p. 59) that the protestants and the Bureau urged "a divestiture" before Division 4 is incorrect. The exceptions filed on behalf of the protestants and the Bureau (certified copies of which appellants have lodged with the Clerk of this Court) do not refer to divestiture and only contend that the Examiner should have recommended a remedial order, such as Division 4 in fact formulated, that the alleged violation of section 5(4) be terminated. Division 4 (R. 87) obviously used "divestiture" in the loose sense meaning any order of separation (including divorce and dissolution as well as divestiture). See *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 327 n. 11; Hale & Hale, *Market Power: Size and Shape Under the Sherman Act* 370 (1958); Oppenheim, *Divestiture as a Remedy Under the Federal Antitrust Laws—Economic Background*, 19 Geo. Wash. L. Rev. 119 (1950).